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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-72-1004

BETHLEHEM STEEL CORPORATION,

Petitioner,

v.

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK and VELVET BROWN, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RALPH L. MCAFEE,
One Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Petitioner

CRAVATH, SWAINE & MOORE
Robert S. Rifkind
Anthony A. Dean
Wayne A. Cross

Kenneth L. Houck
Edward C. Perkins
Of Counsel.

January 18, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Bethlehem Steel Corporation ("Bethlehem") petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the court of appeals (B-1)* and that of the district court (B-2) are not yet reported. The decisions

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* Citations to Appendix A are to page number within appendix (*e.g.* A-8) while citations to Appendices B and C are to the appendix section and, where appropriate, to the page number of the document reproduced therein (*e.g.* B-1 at 654).

of the court of appeals and the district court and the Amended Decree in the prior case entitled *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (2d Cir. 1971), *modifying*, 312 F. Supp. 977 (W.D.N.Y. 1970), are set forth in Appendix C.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 3, 1972. Bethlehem's timely petition for rehearing and suggestion for rehearing in banc were denied on December 4 and December 12, 1972, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

In December 1967, the United States commenced a suit to enjoin Bethlehem "from engaging in any racially discriminatory employment practice" at its Lackawanna, New York, Plant. On October 14, 1971, permanent injunctive relief enjoining such discrimination and benefiting those black employees who had been affected by such discriminatory practices was entered in accordance with the decision of the Court of Appeals for the Second Circuit.

The questions presented are:

1. Is a group of black employees at the Lackawanna Plant entitled to maintain a subsequent action on the same facts to obtain injunctive relief in addition to the comprehensive relief already obtained for them by the United States?

2. Is that group of black employees entitled in a subsequent action on the same facts to obtain preliminary injunctive relief which is inconsistent with the relief fashioned by the decision of the court of appeals in the Government's action?

Statutes

The statutory provisions involved, Sections 703, 706 and 707 of Title VII of the Civil Rights Act of 1964 (Pub. L. No. 88-352, 78 Stat. 255 [42 U.S.C. § 2000e-2, 5 and 6]), are reproduced in relevant part in Appendix A together with subsequent amendments thereto (86 Stat. 103 (1972)).

Statement of the Case

This action is brought by six black employees at Bethlehem's Lackawanna, New York, Plant (the "Plant") pursuant to Section 706 of the Civil Rights Act of 1964 (A-1). The district court denied respondents' motion for a preliminary injunction on the ground that it was precluded from granting the relief sought. The court of appeals reversed, but stayed its mandate pending application for a writ of certiorari.

Respondents are members of the class of beneficiaries of the far-reaching Amended Decree (C-3) entered at the direction of the court of appeals in *United States* v. *Bethlehem Steel Corp.* (*United States* v. *Bethlehem*) (C-1), a suit brought by the United States to vindicate the rights of employees under Title VII of the Civil Rights Act of 1964 by enjoining Bethlehem from engaging in racially discriminatory employment practices. Respondents' motion for a preliminary injunction seeks relief which extends beyond the limits of the relief obtained for them in *United States* v. *Bethlehem* and which is inconsistent with the decision and Amended Decree of the court of appeals in that case.

1. *Title VII of the Civil Rights Act of 1964.*

Section 703* of Title VII provides:

> "It shall be an unlawful employment practice for an employer—

* All references to sections of Title VII are to the original provisions under which respondents brought their action unless otherwise indicated.

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (A-1).

As enacted in 1964, Title VII created the Equal Employment Opportunity Commission (EEOC) and charged it with the duty of investigating charges filed with it alleging discriminatory employment practices in violation of Section 703 and of attempting to eliminate "any such unlawful employment practice by informal methods of conference, conciliation, and persuasion" if it found that there was reasonable cause to believe the charge was true (§ 706(a); A-2). Section 706(e) provided that if such conciliation efforts proved unsuccessful the aggrieved employee could bring a civil action against the employer to enforce the rights granted to him by Section 703 (A-2). Respondents instituted this action under Section 706(e).

Section 707(a) provided (and still provides) an additional enforcement mechanism by authorizing the Attorney General to bring a civil action whenever he has reasonable cause to believe that an employer "is engaged in a pattern or practice of resistance to the full enjoyment" of those rights granted by Section 703 (A-3). Pattern-or-practice suits instituted by the Attorney General under Section 707 seek enforcement of the same rights and interests of individual employees protected by EEOC action and individual suits, but are addressed to alleged denials of those rights which are repeated, routine or of a generalized nature.

The Equal Employment Opportunity Act of 1972 substantially revises the enforcement scheme of Title VII.

Although it confers authority on the EEOC to bring civil actions on behalf of individuals aggrieved by discriminatory practices, suits by individuals remain restricted to instances where the EEOC has failed to act (§ 706(f)(1); A-5). Subject to concurrent jurisdiction with the Attorney General for two years, the 1972 Act makes the EEOC the exclusive enforcement agency for pattern-or-practice suits under Section 707 (§ 707(c),(e); A-8).

2. *United States* v. *Bethlehem.*

In December 1967, the Attorney General commenced a pattern-or-practice suit under Section 707(a) to enjoin Bethlehem from, *inter alia,* continuing discriminatory assignment of black employees to undesirable jobs in predominantly black departments and to provide a remedy for those affected by such practices. The United Steel Workers of America and several of its locals ("the Unions") were also made defendants. Virtually all of the material facts, including the facts of prior discrimination, were stipulated to by the parties. Only the appropriateness of certain aspects of the Government's proposed remedy were litigated.

The relief sought and obtained by the United States provided each member of the "affected class"* an opportunity to reach his rightful place in the labor force at the Plant. The Government contended that, although discriminatory practices had ceased by October 1967, affected class members were locked into the predominantly black departments by provisions of the existing collective bargaining agreement. Under that agreement an employee who trans-

* The "affected class" was defined as all black employees hired prior to October 1, 1967 (the date on which the discriminatory practices charged by the Attorney General were found to have ceased), and originally assigned to one of eleven predominantly black departments (C-3 at 1). A substantial number of black employees are not members of the affected class and in many instances have interests adverse to the members of that class.

ferred to another department in the Plant was required to begin at the bottom of the line of progession in his new department or seniority unit, thereafter accumulating new seniority in that department. Subsequent promotion was determined on the basis of "department" or "unit" seniority—as opposed to "plant" seniority. Therefore, the loss of seniority and earnings following such a transfer might deter a member of the affected class from transferring to departments he deemed more desirable.

In order to remove that supposed deterrent to transfer the United States sought to establish an opportunity for each member of the affected class to transfer and to carry over his previously accumulated plant seniority and previous earnings base to his new job. Under its proposal subsequent promotion would be determined by an employee's total plant, not unit, seniority. The district court denied that relief and the court of appeals reversed and directed entry of an Amended Decree incorporating the requested relief (C-3 at 2).

Among the critical issues raised by the Government's proposed remedy were the system to be applied for determining recall from layoff and the type of vacancy to which transfer by affected class members would be permitted. At the trial and in its brief on appeal, the Government urged that members of the affected class who transferred should be permitted to use their plant seniority *for all purposes*, including recall from layoff, and that they be permitted to transfer to any vacancy at the bottom of any line of progression in the Plant.

Bethlehem and the Unions pointed out in their brief on appeal that permitting transferees to use plant seniority for all purposes, including recall from layoff, would result in transferees being returned to work from layoff ahead of incumbent employees with less plant seniority but greater experience in the department. This proposed acceleration of the advancement of transferees to upper-

level positions in their new departments before they had an opportunity to acquire sufficient training and experience created a situation rife with possibilities for serious industrial accident and posed a serious threat to the safety and efficiency of operations of the Plant.

The probable frequency of transfers and the likelihood that they would result in such a loss of safety and efficiency were increased by the failure of the original Government proposal to distinguish between permanent vacancies and temporary "vacancies" caused by layoffs due to breakdowns, temporary reduction in demand for certain products, or absence due to vacation or illness. When a force reduction occurs, employees having the greatest seniority in a unit are demoted to lower level jobs in the line of progression while less senior employees holding those jobs are laid off. On a subsequent recall, senior employees return to their former jobs and employees who had been laid off entirely are recalled to jobs at the bottom of the line of progression. Thus, as experienced employees are recalled in such a situation, a transferee working in an entry level job would automatically move up to an advanced position by virtue of his greater plant seniority despite his lack of experience in the new unit. Permitting transfers to such temporary "vacancies" subject to being filled by recall is, therefore, equivalent to permitting transfers by inexperienced employees directly to positions in the middle of lines of progression.

In light of those consequences, the United States modified its request at the eleventh hour. In its reply brief to the court of appeals it asserted, *for the first time,* that it was asking only that affected class members be permitted to transfer to permanent vacancies caused by death, retirement or transfer of incumbent employees and that employees recalled from layoff should return to the same relative positions they occupied prior to layoff. The court

of appeals accepted those limitations as disposing of the substantial safety and efficiency problems raised by Bethlehem and the Unions and incorporated them in its opinion and Amended Decree (C-1 at 664, 666; C-3 at 2, para. 5(a)(4)).

3. *Williamson* v. *Bethlehem.*

This case was instituted less than two weeks after the Amended Decree in *United States* v. *Bethlehem* was entered.

It is brought on behalf of a purported class of all "black persons who have been, are employed or might be employed by Bethlehem . . . and who have been and continue to be or might be adversely affected by the practices complained of" (Complaint, para. II). The practices complained of are identical to those set forth in the Government's complaint, with the single addition that Bethlehem is "[r]eturning black employees from layoff on a discriminatory basis." (Complaint, para. VII).

Respondents immediately moved for a preliminary injunction. They neither presented new evidence nor made additional allegations in support of their motion, but relied exclusively on the prior record in *United States* v. *Bethlehem.*

Their motion for a preliminary injunction demands that all black employees on layoff be recalled, based on their plant seniority, to any entry level vacancy in any department or seniority unit subject to being filled by an incumbent employee in layoff status. Such "vacancies" are, of course, exactly the kind of vacancies to which the court of appeals had declined to permit transfer. The injunction sought by respondents would therefore provide a method of transfer which would permit untrained black employees accelerated access to advanced positions in new units thereby displacing incumbent employees with the same deleterious effect on safety and efficiency produced by the Govern-

ment's original proposal. It is in substance the very relief from which the United States withdrew at the last moment and which the court of appeals indicated in *United States* v. *Bethlehem* would not be appropriate.

The district court denied respondents' motion on the grounds that "the relief sought by plaintiffs in the present motion for a preliminary injunction was considered by the Court of Appeals [in *United States* v. *Bethlehem*] and . . . such relief is precluded by its opinion, order and subsequent amended decree entered by this court" (B-2 at 6-7).

The court of appeals reversed and remanded for further proceedings, finding that (1) "[t]he question of recall from layoff . . . was not decided" in *United States* v. *Bethlehem* (B-1 at 321) and (2) "[f]or purposes of res judicata or collateral estoppel, the private citizens in this case are not bound by the Attorney General's action in the former case since they neither were parties to it . . . nor have interests such as to be in privity with the Attorney General" (B-1 at 323). Accordingly, the court below concluded that "this case is one which properly seeks an extension of the relief sought and obtained in the earlier case" (B-1 at 324).

Reasons for Granting the Writ

Bethlehem urges that this Court grant a writ of certiorari and reverse the court of appeals because

> (1) failure to accord finality to a prior judicial decision under Title VII against the same defendants on the same facts will have serious adverse effects on the continued efficacy of Title VII as a device for the elimination of discriminatory employment practices;
>
> (2) respondents are precluded by principles of res judicata and collateral estoppel from maintaining

an action to obtain relief in addition to or inconsistent with that obtained for them in *United States* v. *Bethlehem*; and

(3) in any event respondents are precluded from obtaining relief which is in conflict with that directed by the court of appeals in *United States* v. *Bethlehem*.

1. The holding of the court below that a final decree obtained by the United States under Title VII does not bar a subsequent action by the individuals on whose behalf the decree was obtained presents an issue of fundamental importance to the administration of Title VII and to the effective development of remedies against employment discrimination which has not been, but should be, settled by this Court.

The decision below sanctions a proliferation of litigation that will inevitably defeat rather than vindicate the remedial purposes of Title VII. By denying finality to the judgment obtained in a Government action on behalf of employees, the decision invites the endless relitigation of issues.

The threat of relitigation will seriously impair the efficacy of the conciliation machinery established by Section 706 and will remove any incentive for employers to negotiate the settlement of suits brought under Sections 706 or 707. Furthermore, the decision below will necessarily engender even greater confusion than now exists with regard to the deference that should be accorded prior decisions of state, federal and private agencies authorized to determine employment discrimination questions.

Nothing in Title VII supports the conclusion of the court below that respondents' rights were not represented by the United States and that Congress intended to permit a never-ending series of challenges to final judgments under Title VII. The court of appeals sought to find such statutory authority for multiple suits by noting that the 1972

amendments to the Act authorize individuals to intervene in civil actions brought by the EEOC or the Attorney General, concluding that "presumably individuals not party to the Commission proceedings may institute a suit despite any legal action taken by the Commission or the Attorney General" (B-1 at 324). That interpretation of the amendments ignores the clear language of amended Section 706 which provides that an individual civil suit may be brought only by an individual who has filed a charge (or on whose behalf a charge has been filed) with the EEOC and *only after* the EEOC has failed to bring a suit or to achieve conciliation (§ 706(f)(1); A-5).

In fact, despite the contrary presumption of the court of appeals, the 1972 amendments to Title VII actually clarify the congressional purpose to have all issues resolved in a single proceeding. Among the changes adopted by the amendments are:

First, they limit an employee's right to sue on his own behalf by (a) providing that in investigating a charge of discrimination, the EEOC "shall accord substantial weight to final findings and orders" of state and local authorities —thus reducing the possibility that an employee who has obtained less than all the relief he sought from a state court or agency may secure additional or inconsistent relief from the EEOC (§ 706(b); A-4); (b) authorizing the EEOC to bring suit on the employee's behalf (§ 706(f)(1); A-5); and (c) limiting the employee's right to sue to situations where the EEOC (i) dismisses his charge, (ii) does not sue within 180 days, or (iii) has not entered into a conciliation agreement to which the employee is a party (*ibid.*).

Second, the fact that the amendments provide the employee an explicit statutory right to intervene in an action by the Attorney General or the EEOC (*ibid.*) confirms the legislative intent to have all claims resolved in a single action. While the purpose of that amendment may have been to make certain the individual employee is protected

by permitting his appearance even where his interest is adequately protected by the Government, the addition in no way suggests an intention to permit a multiplicity of successive suits by employees.

Third, to promote uniformity in development of law, goals, policies and procedures, the amendments make the EEOC the exclusive enforcement agency in Title VII cases (§ 707(c)(e); A-8). They also create an Equal Employment Opportunity Coordinating Council charged with promoting uniformity in policies and practices among enforcement agencies (§ 715; A-9). That explicit desire for uniformity is inconsistent with successive litigation by employees of issues previously litigated by the Government.

The court of appeals' decision is thus contrary to the congressional purpose as confirmed by the 1972 amendments. That decision makes the judgments entered in all pattern-or-practice suits, whether brought by the Attorney General or the EEOC, subject to subsequent challenge. Given the concurrent jurisdiction conferred by Section 707(e) it is both possible and likely that the result achieved in a suit brought by the Attorney General might be relitigated in a subsequent suit brought by the EEOC.* Indeed, in this case the EEOC, appearing as *amicus curiae* in both lower courts, supported respondents' challenge to the Government's suit. The uncertainty and confusion inherent in having different federal agencies, with differing interpretations of Title VII, pursuing independent courses in successive actions based on the same facts is a result which is incompatible with the effective enforcement of Title VII and with the manifest congressional purpose.

In addition to the confusion and potential for inconsistent results engendered by the holding below, it serves as a potent inducement to employees to bring successive

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* Between 1968 and 1972 the Attorney General filed 74 cases under Title VII. During 1971, 21 injunctions (including that in *United States* v. *Bethlehem*) were obtained (U.S. ATTORNEY GENERAL, ANNUAL REPORT 53-55 (1971)).

cases. The deleterious impact on judicial resources of this inducement to thousands of employees within a plant to sue must be avoided if the courts are to continue efficiently to process cases under Title VII.

The consequence of the holding below is to make all Title VII litigation—particularly pattern-or-practice suits —more complex, lengthy and contentious than before. Those defendants who would otherwise be disposed to cooperate with the Attorney General or the EEOC in order to bring a pattern-or-practice action to a speedy and inexpensive conclusion* will inevitably be deterred from such a course by the knowledge that the entry of a decree may be the beginning, rather than the end of litigation. Unable to achieve protection against future suits for additional and inconsistent relief, defendants will have no choice but to litigate to exhaustion every colorable issue, creating a rec-

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* The cooperation between Bethlehem and the Government in *United States* v. *Bethlehem* illustrates the manner in which compliance efforts can be facilitated to the benefit of all parties. A joint investigation of the Lackawanna Plant by Bethlehem and the Attorney General in 1967 resulted in a cessation of all discriminatory practices by October 1967 (C-2 at 979). Even before the Attorney General commenced *United States* v. *Bethlehem*, Bethlehem entered into an agreement with the Government resolving all aspects of the case except seniority carryover and rate retention. The company, in effect, consented to all provisions of the decree finally entered except those two very limited areas of relief (C-4). The company also instituted an Affirmative Action Program which went even further than the agreement reached with the Government. As a result of that cooperation black employees who had been previously disadvantaged were immediately provided opportunities for special training leading to craft, supervisory and management positions. Specific goals were established for advancement of qualified black employees. They were given an opportunity to transfer out of the predominantly black departments. All of this was accomplished without the delay normally attendant upon litigation. As a consequence what would otherwise have been a long, complicated and costly trial was reduced to eight days and concerned only very narrow issues of remedy. Formulation and implementation of the Amended Decree mandated by the Second Circuit's opinion required yet further cooperation between Bethlehem and the Government which continues to this day.

ord that will offer as little encouragement as possible to future claimants. The increased burden on the courts and the parties is entirely unnecessary.

Nor can any legitimate purpose be served by the needless uncertainty introduced into the operation of collective bargaining agreements, seniority systems and the entire "system of industrial self-government" affecting the rights and expectations of millions of employees (*Cf. United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)).

For the same reasons, the holding will diminish the ability of the EEOC to resolve charges of discrimination affecting groups or classes of employees by the prescribed methods of "conference, conciliation and persuasion". As long as there is a single employee who is not a party to such conciliation proceedings and who may therefore institute a suit despite conciliation efforts by the Commission (B-1 at 324), a conciliation agreement will not finally dispose of the charge and the conciliation process, if resorted to, will be largely futile.

Finally, the holding increases existing confusion as to the weight to be given to decisions of state civil rights enforcement agencies, private arbitration tribunals and federal agencies. Since a single employer's employment practices are normally subject to the overlapping jurisdiction of such agencies, much judicial time and effort may be saved by giving substantial weight in Title VII litigation to their previous findings and orders. By declining to defer to even a final decree entered pursuant to the order of a federal court of appeals after protracted litigation, the holding below necessarily suggests that the decisions of state and federal agencies and state courts may not be relied upon as having any significant finality.

The fact that the judgment below is interlocutory should not deter a grant of a writ of certiorari in this case. This

petition presents a serious question of law of fundamental importance to the future administration of Title VII which will arise with increasing frequency even before the entry of final judgment herein. If this Court declines review, the district courts, appellate courts, defendants and a variety of federal and state agencies will continue to be burdened by multiple litigation. To decline review simply because of the interlocutory posture of the case is only to defer consideration of the question and create administrative and judicial burdens in the interim.

2. The holding below that respondents do not have "interests such as to be in privity with the Attorney General" (B-1 at 323) is in conflict with the applicable decisions of this Court holding that where an authorized representative asserts an individual's legal right in litigation, the individual is bound by the result and barred from relitigation of the same right. Moreover, that holding is irreconcilable in principle with this Court's decisions* holding that individuals represented in litigation by a government agency are bound by the result. By failing to follow those precedents, the court below not only permits multiple litigation under Title VII, but makes it inevitable.

It is axiomatic that a final decision of an issue has conclusive effect in a subsequent action between the same parties or their privies (*e.g., Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955)). In concluding, without explanation, that respondents are not in privity with the Attorney General, the court below adopted a standard which in its practical effect makes judgments under Title VII binding only upon those who personally were parties to the prior action. That result is contrary to the decision of this Court in *Chicago, R.I. & Pac. Ry.* v. *Schendel*, 270 U.S. 611 (1926). Whether or not respon-

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* *E.g.*, Heckman v. United States; Kersh Lake Drainage District v. Johnson, *infra*.

dents' present demand for injunctive relief is precluded by the judgment obtained by the Government on their behalf "must be determined as a matter of substance and not of mere form. The essential consideration is that it [was] the *right* of the [respondents], and of no one else, which was presented and adjudicated" (*id.* at 618, emphasis added). "[A] person whose interest was represented by one having authority to represent him is bound by the judgment" (1B J. MOORE, FEDERAL PRACTICE 1253 (1965)). In particular, "a prior judgment should be binding in other litigation with the same adversary, when the interest of the same beneficiary is represented in both suits, even though the representative or form of representation in the two suits be different" (*id.* at 1435).

The Attorney General is authorized under Title VII to obtain an injunction "to insure the full enjoyment of the rights herein described" (§ 707(a); A-4). The only substantive rights described in Title VII are those of individuals to be free from discrimination in employment (§703(a); A-1). The court of appeals did not question the district court's finding that respondents allege "the same violations by defendants as were alleged by the Attorney General" (B-2 at 2). Nor did that court identify any right or interest asserted by the Attorney General other than the rights of the affected class of employees. Indeed, it held that the relief sought by respondents is only "an extension of the relief sought and obtained in the earlier case" (B-1 at 324). But a mere variation in the form of relief sought cannot change the fact that the underlying rights asserted in both actions were the same.

Trbovich v. *United Mine Workers of America*, 404 U.S. 528 (1972), the only authority cited by the court below to support its conclusion that the Attorney General did not represent respondents, is inapposite because it dealt with union members' right to limited intervention under a different statutory scheme where this Court explicitly found that

such intervention "will not subject the [defendant] to burdensome multiple litigation" (*id.* at 536). By contrast, the decision of the court of appeals in this case necessarily subjects defendant to a continuation of a burdensome subsequent litigation and opens the door for future suits.

Both the original and amended statutes (§ 706(e); A-2; § 706(f)(1); A-5) permit suits by an individual only after the Attorney General or the EEOC has failed to act on his behalf. Nothing therein authorizes an individual suit where an action has been brought on his behalf, but the result is not to his liking. Interpreting similar statutes providing parallel rights of action, this Court has concluded that individuals whose rights were asserted by a government agency were barred from relitigating the same claims.

In *Heckman* v. *United States*, 224 U.S. 413 (1912), the Attorney General, representing the interests of certain Cherokee Indians, sued to set aside purchases of land allotted to the Indians by statute. The Court forcefully rejected the purchasers', contention that the Indian-grantees were necessary parties, holding that the grantees would be barred from relitigating title to the lands by res judicata:

> "... if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. *Kerrison* v. *Stewart*, 93 U.S. 155, 160; *Shaw* v. *Railroad Co.*, 100 U.S. 605, 611; *Beals* v. *Ill. & c.R.R. Co.*, 133 U.S. 290, 295." (224 U.S. at 445-446).

Similarly, in *Kersh Lake Drainage District* v. *Johnson*, 309 U.S. 485 (1940), this Court barred relitigation of the tax liability of certain individual landowners within the drainage district previously litigated by the commissioners of the drainage district. Because the commission-

ers were charged with the duty of "protecting and enforcing creditors' rights on obligations issued by the District" (*id.* at 490), the prior judgments were res judicata as to individual creditors, even though they had not been parties to the commissioners' prior actions.

The court's failure to follow this long-established legal principle has the effect of permitting respondents, whose interests were fully represented in the prior action, to use the very record previously developed as a basis for relief beyond that sought in the prior case. This result is directly contrary to the principles of res judicata and collateral estoppel and should not be permitted to stand.

3. The court of appeals' failure, on the identical record, to adhere to its own findings and holding in *United States* v. *Bethlehem* so far departs from the accepted and usual course of judicial proceedings as to merit review by this Court. By its holding the circuit court has sanctioned respondents' effort to obtain relief which is directly inconsistent with its prior decision.

The court below concluded that the United States did not seek recall from layoff to new departments on the basis of plant seniority and therefore that such relief was not in contention (B-1 at 322). The briefs and opinion in *United States* v. *Bethlehem* make clear, however, that the United States originally demanded transfer and recall rights which would have included those now claimed by respondents. It later conceded, and the court of appeals found, that safety and efficiency of operations at the Plant would be impaired if the transfer rights granted extended to temporary vacancies and transferees were permitted to use their plant seniority upon recall from layoff (C-1 at 663-666). Respondents' requested relief cannot be implemented without expressly rejecting or overruling that finding.

The principal remedy sought by the Government in *United States* v. *Bethlehem* was a system of preferential

transfers by black employees who had been discriminated against from 11 formerly predominantly black departments to entry level vacancies in other departments. In order to encourage, or at least to minimize any deterrent to, such transfers it also sought rate retention ("red circling") and that "black workers who [transfer] . . . be permitted to exercise their plant seniority *for all purposes* following transfer" (Brief for the United States at 39, emphasis added).

Bethlehem's brief on appeal in *United States* v. *Bethlehem* pointed out that permitting the use of plant seniority for "all purposes" created an anomaly in the proposed relief. While black employees, for reasons of safety and efficiency, were not to be permitted to transfer directly to upper-level jobs and thereby to displace ("bump") white employees, that would be the precise result of allowing a transferee to use his plant seniority for purposes of recall from a subsequent layoff or permitting him to transfer to a temporary "vacancy" caused by a layoff and thereafter use plant seniority to advance. Since laid-off workers who are recalled move upward on a seniority basis as the recall progresses, the transferee would rapidly advance to a position in the middle or top of his new line of progression without having acquired the training and experience necessary to perform in a safe and efficient manner.

The United States recognized that since the deleterious effect on safety and efficiency of such indirect "bumping" gave substantial support to the defense of business necessity, that anomaly had serious implications for the success of its appeal. Therefore, in its reply brief it modified its original proposal as follows:

> "... The United States asks only that black transferees and whites compete on the basis of plant seniority for vacancies occurring in the normal course of business—*i.e.*, vacancies caused by an incumbent dying, retiring, or transferring. For this reason, it would be acceptable to the Government if

> the decree were to provide that, as workers are recalled following a layoff, all employees shall assume the same positions relative to each other as they held immediately prior to the layoff." (Reply Brief for the United States at 19).

In deciding the case, the court of appeals recognized that the business necessity defense was substantial:

> "Appellees' last group of objections are more substantial. . . . In sum, appellees claim that the Government's requested relief will destroy the efficiency and safety of the Lackawanna plant and that modification of present practices and of the district court order is therefore prohibited by what has become known as the 'business necessity' exception to the requirements of Title VII." (C-1 at 662).
>
> • • •
>
> "We do not say that appellees' concerns over the effects of rate retention and seniority carryover are manufactured or advanced in bad faith. But most of them can be met by the carefully limited order suggested by the Government." (C-1 at 663).

The court concluded that the transfer proposal, as limited by the Government in its reply brief, would not produce "unsettling" effects during periods of layoff and recall which would seriously damage the safety and efficiency of the Plant:

> ". . . Regarding displacements caused by layoffs, the Government suggests that, as workers are recalled following a layoff, all employees should assume the same positions relative to each other as they held immediately prior to the layoff. Although plant seniority of transferees will remain as a factor in layoffs, this suggestion will limit the speed with which a transferee can be promoted and the unsettling effects of seniority carryover during periods of layoff and recall." (C-1 at 664).
>
> • • •
>
> ". . . the Lackawanna plant will not be thrown into a chaotic game of musical chairs." (C-1 at 666).

Thus, the position taken by the Government in its reply brief in *United States* v. *Bethlehem* was not, contrary to the opinion below, an omission to seek relief "for reasons such as its lack of knowledge, legal strategy, or lack of enforcement staff" (B-1 at 324), but was the result of serious concern over the defense of business necessity which had prevailed in the lower court. The court's adoption of that position was not a mere reference to the problem, but was rather an integral part of the balance it sought to create between the rights of black employees who had been disadvantaged by past employment practices and the interest of all parties in preserving the safety and efficiency of operations at the Plant.

The conclusion of the court of appeals that those issues were not technically decided and that its prior opinion is not binding on subsequent litigants ignores the fact that the effect of the remedy fashioned in *United States* v. *Bethlehem* on the safety and efficiency of the Plant was central to that case. Respondents now seek to have the courts below ignore that finding and relitigate the question, without regard to the considerable burden placed on the courts and defendants by such a result.

Conclusion

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

RALPH L. MCAFEE,
One Chase Manhattan Plaza,
New York, N. Y. 10005
(212) 422-3000
Attorney for Petitioner

CRAVATH, SWAINE & MOORE
Robert S. Rifkind
Anthony A. Dean
Wayne A. Cross

Kenneth L. Houck
Edward C. Perkins
Of Counsel

January 18, 1973

APPENDIX A

(Illustrations)

Civil Rights Act of 1964, Title VII

Section 703(a). Pub. L. No. 88-352 § 703(a), 78 Stat. 255 [42 U.S.C. § 2000e-2(a)].

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 706(a),(e),(f),(g). Pub. L. No. 88-352 § 706(a),(e),(f),(g), 78 Stat. 259 [42 U.S.C. § 2000e-5(a),(e),(f),(g)].

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investi-

gation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

* * *

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings

for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court . . . shall have jurisdiction of actions brought under this subchapter. . . .

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

* * *

SECTION 707(a). Pub. L. No. 88-352 § 707(a), 78 Stat. 261 [42 U.S.C. § 2000e-6(a)].

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is in-

tended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order aainst the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Civil Rights Act of 1964, Title VII
(As amended by Equal Employment Opportunity Act of 1972)

Section 706(a), (b), (f)(1), (g). Equal Employment Opportunity Act of 1972 § 4, 86 Stat. 104, *amending* 78 Stat. 259 (1964) [42 U.S.C. § 2000e-5(a), (e), (g)].

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent")

within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent

a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an

attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individaul as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimina-

tion on account of race, color, religion, sex, or national origin or in violation of section 704(a).

SECTION 707(c),(d),(e). Equal Employment Opportunity Act of 1972 § 5, 86 Stat. 107, *amending* 78 Stat. 261 (1964) [42 U.S.C. § 2000e-6].

(a) [Unchanged].

• • •

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted

in accordance with the procedures set forth in section 706 of this Act.

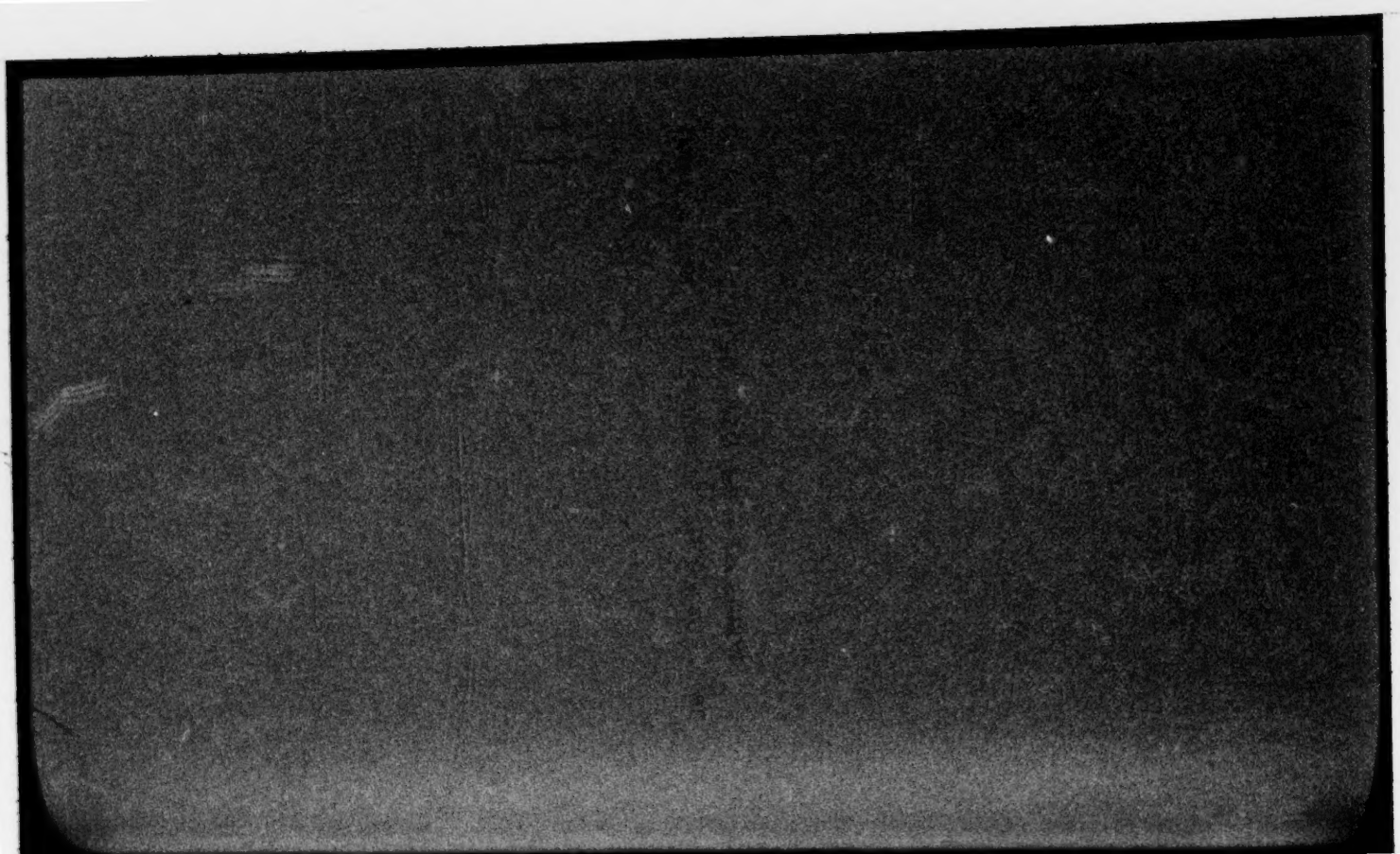
SECTION 715. Equal Employment Opportunity Act of 1972 § 10, 86 Stat. 111.

There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

APPENDIX B

(Opinions Below)

Williamson v. Bethlehem Steel Corp.,
— F. 3d —, Docket No. 72-1430 (2d Cir. Nov. 3, 1972)



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 58—September Term, 1972.

(Argued September 29, 1972 Decided November 3, 1972.)

Docket No. 72-1420

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK, and VELVET BROWN, JR.,

Plaintiffs-Appellants,

v.

BETHLEHEM STEEL CORPORATION; LOCAL 2601, UNITED STEELWORKERS OF AMERICA; LOCAL 2602, UNITED STEELWORKERS OF AMERICA; LOCAL 2603, UNITED STEELWORKERS OF AMERICA; LOCAL 2604, UNITED STEELWORKERS OF AMERICA; LOCAL 3144, UNITED STEELWORKERS OF AMERICA; and UNITED STEEL WORKERS,

Defendants-Appellees.

Before:

MANSFIELD, OAKES and TIMBERS,

Circuit Judges.

Appeal from an order denying a preliminary injunction under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) *as amended,* 1972 U.S. Code Cong. & Ad. News 814 *et seq.,* and the Civil Rights Act of 1866, 42 U.S.C.

§ 1981, in the District Court for the Western District of New York, John O. Henderson, *Judge*.

Reversed and remanded.

RUSSELL SPECTER, Washington, D. C. (Paul J. Spiegelman, Washington, D. C.; Richard Lipsitz and Carmin R. Putrino, Buffalo, New York, of counsel), *for Appellants*.

MARTIN SLATE, Washington, D. C., *for Equal Employment Opportunity Commission, Amicus Curiae*.

RALPH L. MCAFEE, New York, New York, *for Defendant-Appellee Bethlehem Steel Corporation*.

MICHAEL H. GOTTESMAN, Washington, D. C. (Thomas Krug, Buffalo, New York, of counsel), *for Union Defendants-Appellees*.

OAKES, *Circuit Judge:*

Appellants are six black employees at appellee Bethlehem Steel Corporation's (hereinafter "Bethlehem") Lackawanna, New York, plant. All six have at least 15 years' seniority. They filed a motion below seeking a preliminary injunction against Bethlehem and the named appellee locals of the United Steelworkers (hereinafter collectively "the Union") enjoining the recall of laidoff employees on what they claim is a racially discriminatory basis. The complaint proper alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. as amended*, 1972 U.S. Code Cong. & Ad. News 814 *et seq.*, and of the Civil Rights Act of 1866, 42 U.S.C. § 1981, in regard not only to layoff recalls but also to hiring, referral, transfer,

assignment procedures, and advancement opportunities. The district court denied the appellants' motion for a preliminary injunction on the ground that in a previous case brought by the Attorney General against the defendants in this circuit, *United States* v. *Bethlehem Steel Corp.*, 312 F. Supp. 977 (W.D.N.Y. 1970), *modified*, 446 F.2d 652 (2d Cir. 1971), the relief sought here was considered but not granted. We reverse and remand to the district court for findings and an order in accordance with this opinion.

The district court proceeded upon the erroneous assumption that it was bound as against these appellants by the modified order in the earlier Title VII case. That case involved seniority and transfer provisions of the collective bargaining agreements between Bethlehem and the Union which both the trial and appellate courts found discriminatory, one form of discrimination consisting of assignment in the past of black employees to 11 of the less desirable departments of the Lackawanna plant. The seniority system, based upon departmental rather than plantwide service, was found to have helped perpetuate the discrimination by "locking in" black employees to the less desirable departments and jobs. The question of recall from layoff was touched upon only to clarify that it was an issue which was not decided in that case. The Attorney General had originally urged that plant seniority be used "for all purposes," although the specific relief sought related only to retention of earlier pay rates and seniority carry-over for employees transferring from one department to another and then only in the situation of a vacancy occurring in the other department. In Bethlehem's and the Union's answering briefs on appeal they had urged that use of a plantwide seniority system would result in permitting laidoff black employees to move into jobs they had never held before the layoff ahead of both black and

white employees who had held such jobs. Meeting this argument, the Government in its reply brief on appeal contended that the relief it sought related only to vacancies caused by death, retirement or transfer and that it would be acceptable if on recall after layoff "all employees shall assume the same positions relative to each other as they held immediately prior to the layoff." Reply Brief for the Appellant at 19, *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). In other words, the Government expressly did not seek the very relief plaintiff-appellants seek here.

In the court's opinion Judge Feinberg noted that most of Bethlehem's and the Union's concerns over the effect of seniority carry-over could be "met by the carefully limited order suggested by the Government," 446 F.2d at 663, and, after noting the Government's suggested exception for recall after layoff, pointed out that the suggested exception would limit "the unsettling effects of seniority carryover during periods of layoff and recall." *Id.* at 664. The court's order adopted the Government's suggestion. *Id.* at 666. It is thus true as Judge Henderson said below that this court "considered" the question of recall after layoff, but only to point out that in accordance with the Government's "moderate" prayer for relief, *id.* at 659, the question was not in contention. Indeed, the United States, now acting through the Equal Employment Opportunity Commission ("EEOC") as amicus curiae, takes the position that this court should grant the relief the United States previously *did not seek*.[1] The EEOC goes on to point out

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1 The Assistant Attorney General for Civil Rights on July 16, 1971, wrote the Union's counsel that the Government's agreement to interpretation of the district court order in accordance with the suggestion it had made on appeal "does not foreclose our right to seek such relief in other cases of this kind." Letter from David L. Norman to Michael H. Gottesman, in Appellants' Appendix at 27a.

that between 1968 and 1972 Bethlehem laid off about 50 per cent of its workers, so that arguably a change of circumstance has occurred since suit was first instituted by the Government and new relief is justified. We need not, however, rest our decision on that narrow ground.

For purposes of res judicata or collateral estoppel, the private citizens in this case are not bound by the Attorney General's action in the former case since they neither were parties to it, *NLRB* v. *Lannom Manufacturing Co.*, 226 F.2d 194, 199 (6th Cir. 1955), *rev'd on other grounds sub nom. Amalgamated Meat Cutters v. NLRB*, 352 U.S. 153 (1956), nor have interests such as to be in privity with the Attorney General. *Cf. Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-39 (1972) (intervention by union members permitted in Labor-Management Reporting and Disclosure Act litigation brought by the Secretary of Labor). Therefore, the judgment in the previous case does not have conclusive force here. *See* Restatement of Judgments § 93 *et seq.* (1942); 1B J. Moore, Federal Practice ¶ 0.411[1] (2d ed. 1965). *See also Hartford Accident & Indemnity Co.* v. *Jasper*, 144 F.2d 266, 267 (9th Cir. 1944).

Nor, for the reasons explained above—namely that the Government did not seek relief in the case of recall after layoff—does the earlier decision bind us on the basis of stare decisis. *O'Donoghue* v. *United States*, 289 U.S. 516, 550 (1933); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821); 1B J. Moore, *supra* at ¶ 0.402[2].

Under Title VII since its inception, moreover, the individual has played a significant role in its enforcement. *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1968). This is equally true after the amendment of Title VII by the Equal Employment Opportunity Act of 1972, 1972 U.S. Code Cong. & Ad. News 814 *et seq.* While the 1972 amendments authorize the Equal Employment Oppor-

tunity Commission to bring a Title VII suit in the name of the Government, individuals party to Commission conciliation proceedings in the same action may intervene in such suits, and in those brought by the Attorney General, *id.* § 706(f)(1), 1972 U.S. Code Cong. & Ad. News 817-18,[2] and presumably individuals not party to the Commission proceedings may institute a suit despite any legal action taken by the Commission or the Attorney General.

The purpose of permitting the individual who has been discriminated against to seek relief where the Government has omitted to do so—possibly for reasons such as its lack of knowledge, legal strategy, or lack of enforcement staff—is plainly to make certain that the individual employee is protected. Indeed, in the case of the Bethlehem Lackawanna plant, when the Attorney General instituted the earlier case in 1967 only 3.8 per cent of the nation's workforce was unemployed. U.S. Bureau of Labor Statistics, Dep't of Labor, 19 Employment & Earnings 20 (Sept. 1972). The very first case involving the issue of discriminatory seniority and transfer systems was decided only in January of 1968. *Quarles* v. *Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). The discriminatory impact of a departmental seniority recall system where there have been a multitude of layoffs may not have been foreseen by Government counsel in the earlier suit, especially where the Government was concerned with establishing a favorable precedent in the case of interdepartmental transfers. Thus, this case is one which properly seeks an extension of the relief sought and obtained in the earlier case. The

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2 Not insignificantly, in debating the Equal Employment Opportunity Act, Congress refused to make Title VII the exclusive statutory basis for private suits against employment discrimination and continued to allow suits to be brought, for example, under Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. *See* 118 Cong. Rec. S1524-26 (daily ed. Feb. 9, 1972); *id.* at S1791-97 (daily ed. Feb. 15, 1972).

individual plaintiffs, we hold, are entitled to bring it. This being true, we are required to reverse the decision below so that the trial court may proceed to the merits of the case.

We do not ourselves, however, grant the preliminary relief sought. True, the scope of relief to be afforded is "so far as possible, to eliminate the present effects of past discrimination," *Long* v. *Georgia Kraft Co.*, 450 F.2d 557, 561 (5th Cir. 1971). *Accord, Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 720-21 (7th Cir. 1969). True also, the court's powers under Title VII are "broad," *Vogler* v. *McCarty, Inc.*, 451 F.2d 1236, 1238 (5th Cir. 1971), and, of course, include the power to grant preliminary relief. *United States* v. *Hayes International Corp.*, 415 F.2d 1038, 1044-45 (5th Cir. 1969). Moreover, the findings of past discrimination by the district court in *United States* v. *Bethlehem Steel Corp., supra*, 312 F. Supp. at 979-86, and the Bethlehem stipulation in the earlier case that until October 1, 1967, black employees were assigned on account of race to 11 of the 82 departments at the Lackawanna plant, in which the hottest, dirtiest and lowest-paying jobs were located, are together fairly conclusive of past discrimination here which cannot be frozen into the plant employment system under the Act. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971).

But we do not delineate the precise extent of the preliminary (or final)[3] relief which might be granted for the reason that there appear to us to be several areas warranting, if not requiring, exploration by the district court. These include the question how extended a layoff must be

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3 This may be an appropriate case for the district court under Fed. R. Civ. P. 65(a)(2), to exercise its power to hear the applications for preliminary and permanent relief simultaneously.

before it is no longer temporary.[4] We should add, however, that we do not take the position, urged upon us by appellees, that in the case of an extended layoff there is truly a "bump" of white workers as that term was used in our own opinion in *United States* v. *Bethlehem Steel Corp., supra,* 446 F.2d at 663-64, or has been described in the seminal Note, *Title VII, Seniority Discrimination and the Incumbent Negro,* 80 Harv. L. Rev. 1260, 1273-74 (1967) (advocating "rightful place" as opposed to "freedom now"), and the first seniority rights cases following it, *Quarles* v. *Philip Morris, Inc., supra,* 279 F. Supp. at 516; *Local 189, United Papermakers* v. *United States,* 416 F.2d 980, 988-91 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). Rather, we agree with the Fifth Circuit that recall privileges after an extended layoff which operate to the residual disadvantage of black workers who had been discriminated against by a seniority system can violate Title VII and are subject to judicial modification. *United States* v. *Hayes International Corp.,* 456 F.2d 112, 118-19 (5th Cir. 1972). *See also Local 1251, UAW* v. *Robertshaw Controls Co.,* 405 F.2d 29, 33 (2d Cir. 1968) (en banc) ("Seniority is wholly a creation of the collective agreement and does not exist apart from that agreement"), and *Developments in the Law —Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1155-63 (1971).[5]

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4 Under Art. X, 10.10.05 of the 1968 Master Agreement, we are told, an employee laid off for six months or more has the right (if he has two years' plant service) to a job in any seniority pool in the plant if he is qualified to perform the job and for the promotional sequence. The court may well wish to determine whether that six months is an unreasonable time.

5 While we do not, by omission, summarily reject appellees' arguments dealing with plant safety and efficiency, the "team concept" and other factors (including individual ability) which the courts have taken into account in Title VII cases, *provided that the practice involved is essential to those goals, e.g., United States* v. *Bethlehem Steel Corp., supra,*

Some other questions which will occur to the district court in fashioning full, fair, just and adequate relief may include:

1. To what class should any relief extend? *E.g.*, should only black employees hired before the October 1, 1967, date that marked the apparent end of discriminatory hiring be assisted? Subsidiarily, of what class are the plaintiffs here representative? The Union suggests that many black employees would oppose the relief sought here.

2. How does the seniority system affect pools?[6] Should relief be limited to recall to "pools" as distinguished from recall to positions up the ladder? Parenthetically we note that this question may be academic since we gather that employees "bump up from" and "down to" the "pool" so that generally employees are recalled only to pools, but we lack the findings to be certain of this.

3. Should laidoff white employees also be treated as having plantwide seniority? If they were, would this have the

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446 F.2d at 662, we do point out that the Master Agreement itself recognizes plant seniority as the basis for recall under certain conditions, which tends to weaken somewhat the force of appellees' arguments justifying unit seniority. *See* n.4 *supra*.

6 Under the amended decree in *United States* v. *Bethlehem Steel Corp.*, Civil No. 1967-32 (W.D.N.Y., filed Oct. 14, 1971), recall has worked as follows:

A. Laidoff employees have been recalled to or assigned into pool jobs, usually entry-level jobs, on the basis of plant service;

B. Employees have been recalled from pool jobs to higher rated jobs in their seniority unit on the basis of unit, not plant service, except as to

C. Black employees who had transferred out of the 11 "black" departments, as to whom plant service of all competing employees is used to determine the order of recall.

Apparently also Bethlehem has decreased the number of job pools from 36 to 6, thus permitting easier transfer since transfers between departments in the same pool were apparently permissible. *See* Brief for Appellee Bethlehem Steel Corp. at 8.

effect of recalling white employees to positions held before layoff by black employees, and, if so, would this be consistent with Title VII?

Thus, in remanding to the district court, we do so for the purpose of enabling it further to explore the facts and adjust the relief accordingly, recognizing that we are not dealing in absolutes that require an appellate court to be the bull in a china shop of complex inter-employee and plant relations. At the same time we know that the district court is aware of our own injunction, so well expressed in Judge Feinberg's opinion, that "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." 446 F.2d at 663.

The district court on remand, we are confident, will act, in the phrase of Charles V, with an "iron hand in a velvet glove."

Reversed and remanded.

Williamson v. Bethlehem Steel Corp.

— F. Supp. —, Civil 1971—487 (W.D.N.Y. Feb. 16, 1972)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE H. WILLIAMSON, JR; TIMOTHY SMITH; JAMES B. LINDSAY; EDWARD GREEN, JR; WILLIAM A. CLARK; and VELVET BROWN, JR.

Plaintiffs

-vs- CIVIL 1971-487

BETHLEHEM STEEL CORPORATION, a corporation; LOCAL 2601, UNITED STEELWORKERS OF AMERICA; LOCAL 2602, UNITED STEELWORKERS OF AMERICA; LOCAL 2603, UNITED STEELWORKERS OF AMERICA; LOCAL 2604, UNITED STEELWORKERS OF AMERICA; LOCAL 3144, UNITED STEELWORKERS OF AMERICA; and UNITED STEELWORKERS,

Defendants

APPEARANCES: SPECTER & SPIEGELMAN (PAUL J. SPIEGELMAN, ESQ., of Counsel), Washington, D.C.; LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES (RICHARD LIPSITZ, ESQ. and CARMIN R. PUTRINO, ESQ., of Counsel), Buffalo, New York, for Plaintiffs.

CRAVATH, SWAINE & MOORE (RALPH L. McAFEE, ESQ., of Counsel), New York, New York; HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (STEPHEN KELLOGG, ESQ., of Counsel), Buffalo, New York, for Defendant Bethlehem Steel Corp.

B-

BREDHOFF, GOTTESMAN & COHEN (MICHAEL GOTTESMAN, ESQ., of Counsel), Washington, D.C., for Defendant United Steelworkers.

A.C. WHARTON, JR., ESQ., Washington, D.C., for the Equal Employment Opportunity Commission.

Plaintiffs, six black employees of Bethlehem Steel's Lackawanna plant, commenced the present action under Title VII of the Civil Rights Act of 1964 on behalf of themselves and other such employees who they claim are similarly situated. The complaint alleges the same violations by defendants as were alleged by the Attorney General before this court in United States v. Bethlehem Steel Corporation, et al., 312 F. Supp. 977, modified, 446 F.2d 652 (2d Cir. 1971). The difference here is that plaintiffs are seeking additional remedies not granted in the suit by the Attorney General. These additional remedies include a claim to back pay and certain claimed rights regarding recall from layoff.

Plaintiffs now seek a preliminary injunction enjoining defendant Bethlehem Steel Corporation from limiting black employees in a layoff status to return

to employment only to openings in the department or seniority unit in which they were employed at the time of their layoff. They seek instead to have black employees afforded the opportunity to return to any department or seniority unit in which an opening occurs, which can be filled by an employee in a layoff status based upon qualifications and plant seniority.

The Equal Employment Opportunity Commission, which has previously been granted amicus curiae standing in this matter, supports plaintiffs' position. Defendants oppose the application on a number of grounds, including a claim that the Second Circuit opinion and subsequent order in United States v. Bethlehem Steel Corporation, et al., supra, preclude the granting of such relief. Plaintiffs contend that the question of recall from layoff was neither urged nor decided by the Second Circuit. For the reasons set forth below, plaintiffs' motion for a preliminary injunction is denied.

In United States v. Bethlehem Steel Corporation, et al., supra, the government urged, both before the court initially and on appeal, that plant seniority be used by members of the affected class "for all purposes." Both the company and the union argued that such a broad plan would work gross inequities among black as well as white employees. Specifically, in the layoff recall situation they pointed out in their answering briefs on appeal that such a broad plan would have the effect of permitting members of the affected class to move into jobs,which they never held before the layoff, ahead of both black and white employees who had held such jobs prior to the layoff.

Apparently in response to this position, the government, at page 19 of its reply brief to the Court of Appeals, stated:

> "The United States asks only that black transferees and whites compete on the basis of plant seniority for vacancies occurring in the normal course of business -- i.e., vacancies caused by an incumbent dying, retiring, or transferring. For this reason, it would be

> acceptable to the Government if the decree were to provide that, as workers are recalled following a layoff, all employees shall assume the same positions relative to each other as they held immediately prior to the layoff."

The Second Circuit, in its opinion, seemed to clearly acknowledge this limitation in the government's proposal. It stated specifically that

> "/T/he right of transfer or to bid upward, under the Government's proposals, would not be unlimited or unconditional. A transfer would only be to fill vacancies; there would be no bumping of 'white' employees out of a job. . . . Thus it is clear that the relief sought by the Government is moderate." 446 F.2d at 659.

In the same respect, the court went on to observe the following:

> "We do not say that Appellees' concerns over the effects of . . . seniority carryover are manufactured . . . But most of them can be met by the carefully limited order suggested by the Government. . . . /B/ecause plant seniority will only be used in bids upwards for vacancies occurring in the normal course of business, i.e., vacancies caused by the death, retirement or transfer of an incumbent or by creation of a new job, an employee will not

> ...be 'bumped' out of his job in such situations by a transferee. Regarding displacements caused by layoffs, the Government suggests that, as workers are recalled following a layoff, all employees should assume the same positions relative to each other as they held immediately prior to the layoff. Although plant seniority of transferees will remain as a factor in layoffs, this suggestion will limit the speed with which a transferee can be promoted and the unsettling effects of seniority carryover during periods of layoff and recall." (Id. at 603-604. Emphasis added.)

Finally, at the end of its opinion the Court of Appeals set forth the following:

> "On appropriate order we should grant an employee who has been discriminated against ('a transferee') at least the following relief:
>
> . . . .
>
> "(2) A transferee shall be permitted to exercise plant seniority for all purposes following transfer, except as otherwise set forth herein. . . . As workers are recalled after a layoff, all employees shall assume the same positions relative to each other as they held immediately prior to layoff. (Id. at 606; emphasis added)."

In view of the foregoing, this court finds that the relief sought by plaintiffs in the present

motion for a preliminary injunction was considered by the Court of Appeals and concludes that such relief is precluded by its opinion, order and subsequent amended decree entered by this court. Accordingly, the motion is denied.

It is so ordered.

/s/ John O. Henderson

JOHN O. HENDERSON
United States District Judge

DATED: Feb. 16th 1972.

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APPENDIX C

(Opinions in *United States* v. *Bethlehem Steel Corp.*)

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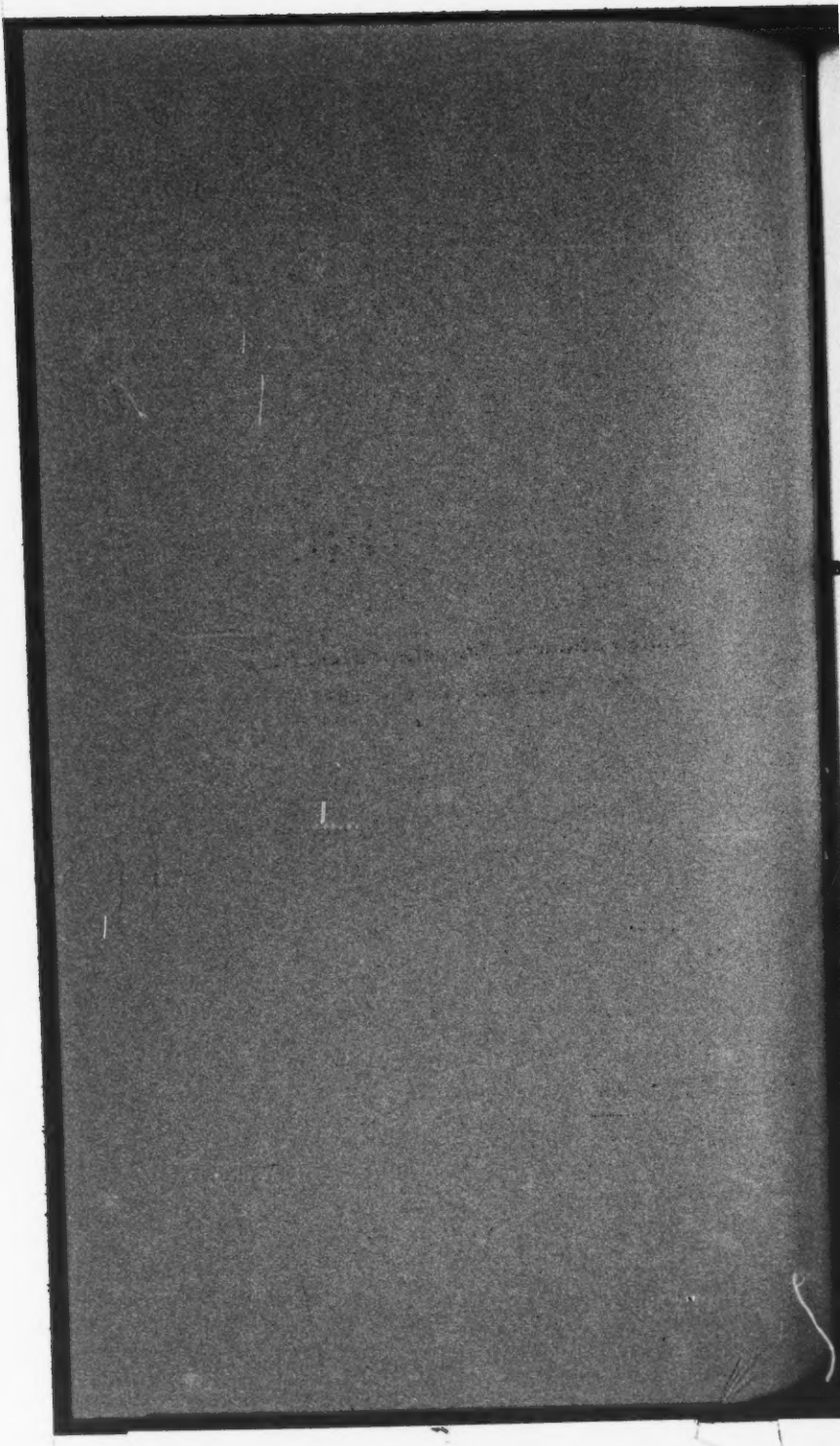
United States v. Bethlehem Steel Corp.
446 F. 2d 652 (2d Cir. 1971)



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UNITED STATES of America,
Plaintiff-Appellant,

v.

THLEHEM STEEL CORPORATION
et al., Defendants-Appellees.

No. 286, Docket 35183.

United States Court of Appeals,
Second Circuit.

Argued Dec. 7, 1970.

Decided June 21, 1971.

Suit was filed pursuant to Title VII ivil Rights Act of 1964 in which it alleged that employer discriminated ist blacks in hiring, job assignment, enticeship and selection of supervi- personnel at its plant, and an dment to complaint added unions as ndants. The United States District t for the Western District of New , John O. Henderson, Chief Judge, d portion of relief sought by Unit- States, and United States appealed. Court of Appeals, Feinberg, Circuit e, held that where seniority and fer provisions were found to tend perpetuate effects of employer's er admitted discriminatory prac- and concerns over effects of rate tion and seniority carry-over to t the discriminatory effects could a carefully limited order and if discriminatorily assigned employees could not keep in their new jobs their former rate of pay and seniority few would transfer and those that did would suffer an economic penalty and be forever behind their white contemporaries, relief requested with regard to seniority carry-over and rate retention should have been granted.

Order modified and case remanded.

1. Civil Rights ⇐3

Where effect of employer's admitted, numerous discriminatory practices over many years was to force blacks into 11 less desirable departments in plant solely on basis of race and though such overt practices were finally discontinued seniority and transfer provisions perpetuated their effects by tending to lock discriminatorily assigned employees into their jobs and by providing that transferee to a "white" department would never be able to reach level of white employee already there, seniority and transfer provisions were based on past discriminatory classifications and their continued use perpetuated discrimination and violated Civil Rights Act of 1964. Civil Rights Act of 1964, § 703(a, h), 42 U.S.C.A. § 2000e–2(a, h).

2. Civil Rights ⇐13

In action under Title VII of Civil Rights Act of 1964 with complaint alleging that employer discriminated against blacks in hiring, job assignment, apprenticeship and selection of supervisory personnel at plant, where discrimination found illegal was to a group, group remedy was appropriate. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights ⇐3

Even a discriminatory system that does not completely deter job transfers but only discourages them should be changed and criterion in fashioning a remedy under Title VII of Civil Rights Act of 1964 is what would be necessary to insure sufficient incentive to transfer

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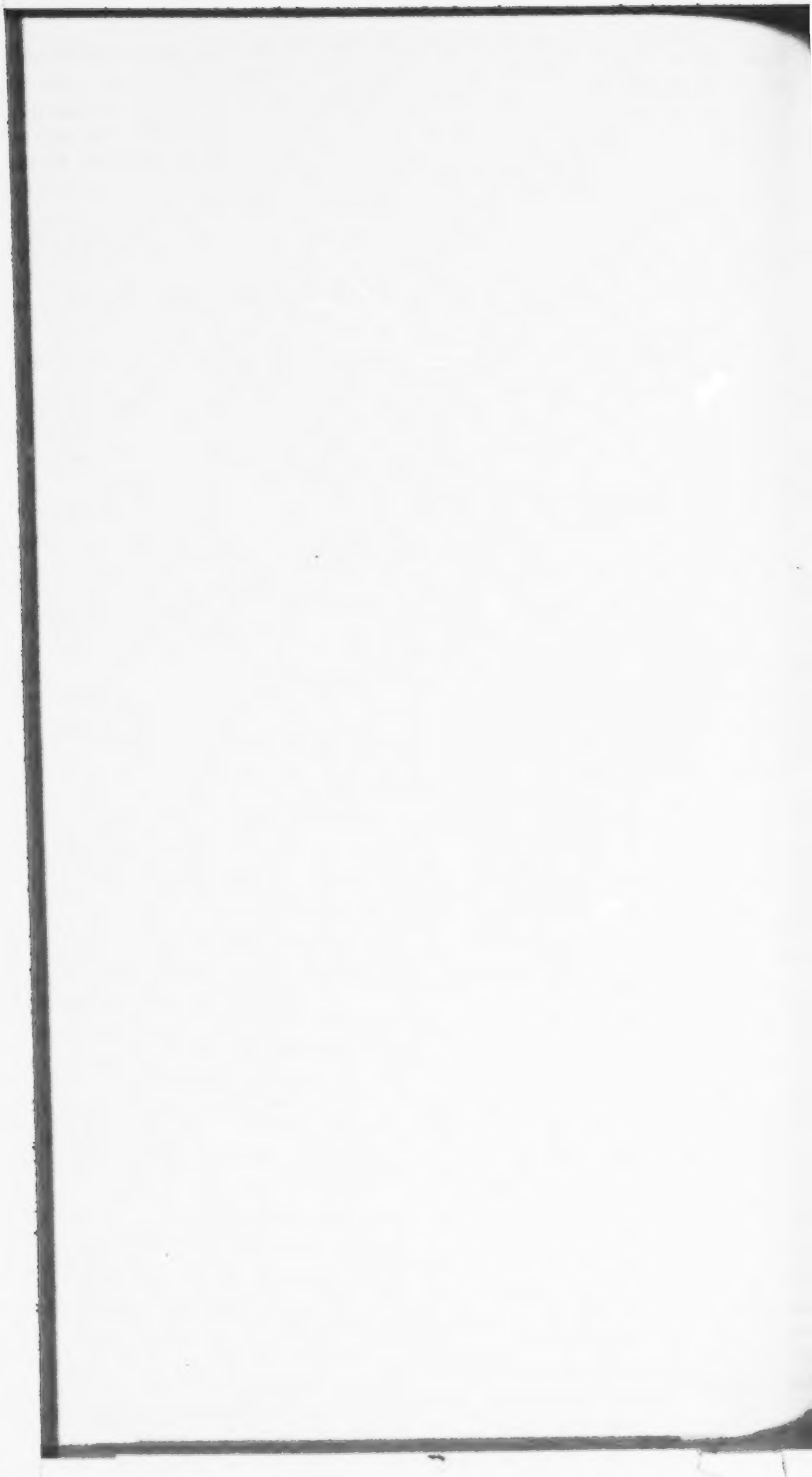

that effects of past discrimination would not be perpetuated, and relief under the Act should give discriminated employees as future vacancies arise the opportunity to obtain jobs that they would have earned had there been no discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Courts ⇐406.9(5)

Even under abuse of discretion test of review, if court used erroneous criterion in applying Title VII of Civil Rights Act of 1964 to correct admitted former discriminatory practices in hiring and in job, apprenticeship and supervisory assignments, order should be modified. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights ⇐8

Provision of Title VII of Civil Rights Act of 1964 that it shall not be an unlawful employment practice for employer to apply different terms or conditions of employment pursuant to bona fide seniority system providing that such differences are not result of intention to discriminate because of race would not protect seniority system which tended to perpetuate effects of employer's prior admitted discriminatory practices in hiring and in job, apprenticeship and supervisory assignments, and alteration of seniority rights to correct effects of the past discrimination would not be improper. Civil Rights Act of 1964, § 703(h), 42 U.S.C. A. § 2000e–2(h).

6. Civil Rights ⇐8

In suit in which seniority and transfer provisions were found to tend to perpetuate effects of employer's prior discriminatory practices, "business necessity" exception to requirements of Title VII of Civil Rights Acts of 1964 had to mean more than that transfer and seniority policies served legitimate management functions, and to be preserved policies had to not only directly foster safety and efficiency of plant but be essential to those goals and if legitimate [illegible] of safety and efficiency could be served by reasonably available alternative system with less discriminatory effects, present policies could not be continued. Civil Rights Act of 1964, § 7 et seq., 42 U.S.C.A. § 2000e et seq.

7. Civil Rights ⇐8

Where seniority and transfer provisions were found to tend to perpetuate effects of employer's prior discriminatory practices and basic goal of seniority system would not necessarily be frustrated by remedies of rate retention and seniority carry-over, unqualified workers did not need to be promoted whether or not he was a transferee under the order and transferees were not moved directly to high or middle level jobs and did not displace workers from jobs presently held, business necessity doctrine did not require denial of proposed relief of use of rate retention and seniority carry-over. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐8

Where seniority and transfer provisions were found to tend to perpetuate effects of employer's former admitted discriminatory practices and concern over effects of rate retention and seniority carry-over to correct the discriminatory effects could be met by a careful limited order and if discriminatorily assigned employees could not keep in the new jobs their former rate of pay and seniority few would transfer and those that did would suffer an economic penalty and be forever behind their white contemporaries, relief requested with regard to seniority carry-over and rate retention should have been granted. Civil Rights Act of 1964, §§ 701 et seq., 703(a, h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a, h).

9. Civil Rights ⇐8

Where seniority and transfer provisions were found to tend to perpetuate effects of employer's prior admitted discriminatory practices and to correct those discriminatory effects relief with regard to seniority carry-over and rate retention should have been granted, such relief should have been extended to em

ployees who had been discriminatorily assigned to departments and thereafter had exercised their limited right to transfer, as well as those employees who had not transferred, since the former suffered effects of discrimination and were unable to reach same level as their white contemporaries. Civil Rights Act of 1964, §§ 701 et seq., 703(a, h), 42 U. S.C.A. §§ 2000e et seq., 2000e–2(a, h).

10. Civil Rights ⇐3

Evidence showing at most that at some indeterminate time in past certain ethnic groups congregated in certain departments because man in charge tended to hire such persons was not sufficient proof that any of white employees in those departments were there because they could not obtain jobs elsewhere in the plant and was insufficient to support district court's finding that any of the whites were victims of discrimination prohibited by Title VII of Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. Civil Rights ⇐3

Where seniority and transfer provisions were found to tend to perpetuate effects of employer's prior admitted discriminatory practices against blacks and there was no proof that employer rejected any white applicants to apprenticeship program on basis of religion, sex or national origin and there was no reason given for change from pretrial order relief based upon discrimination in apprenticeship program applying to Negro applicants, district court erred in extending relief to white applicants. Civil Rights Act of 1964, § 701 et seq., 42 U. S.C.A. § 2000e et seq.

David L. Rose, Atty., Dept. of Justice (Jerris Leonard, Asst. Atty. Gen., H. Kenneth Schroeder, Jr., U. S. Atty. W. D. N. Y., Robert T. Moore, Atty., Dept. of Justice, on the brief), for plaintiff-appellant.

Ralph L. McAfee, New York City (Cravath, Swaine & Moore, New York City, on the brief), for defendant-appellee Bethlehem Steel Corp.

Michael Gottesman, Washington, D. C. (Bredhoff, Gottesman & Cohen, Washington, D. C., Bernard Kleiman, Chicago, Ill., Thomas Krug, Tiernan, Krug & Godinho, Buffalo, N. Y., on the brief), for defendants-appellees Unions.

Before LUMBARD and FEINBERG, Circuit Judges, and CLARIE, District Judge.*

FEINBERG, Circuit Judge:

In December 1967, the Attorney General of the United States brought an action against the Bethlehem Steel Corporation in the United States District Court for the Western District of New York. Suit was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., a historic legislative attempt to deal with the national problem of discrimination in employment. The complaint alleged that Bethlehem discriminated against blacks in hiring, job assignment, apprenticeship and selection of supervisory personnel at its plant in Lackawanna, New York. An amendment to the complaint in May 1968 added the United Steelworkers of America and five local unions as defendants and alleged that portions of the collective bargaining agreement between Bethlehem and the unions perpetuated discrimination.

Before trial, defendants admitted that many of the charges against them were true, but they refused to stipulate that portions of the labor contract violated the Act. A trial on that one issue was held before Chief Judge John O. Henderson. The judge held in a comprehensive opinion, 312 F.Supp. 977, that the contract provisions as to transfer rights and seniority did perpetuate the effects of prior discrimination. As a result, the judge granted priority transfer rights to those who had been discriminated against, but denied a portion of the

* Of the District of Connecticut, sitting by designation.

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ught by the Government that would have made the exercise of such rights more attractive. From that order only the Government appeals. For reasons set forth below, we modify the order. The principal effect of our opinion is to grant to those who have been treated illegally in the past the right to transfer without loss of pay or seniority.

I.

The Lackawanna plant, one of the largest of its type in the country, employs about 18,000 workers, of whom approximately 2,600 are black. Operations at the plant cover all phases of steel production from the receipt of raw materials to the final product. Hourly-paid employees, who are represented by the defendant unions, work in 74 of the plant's 82 departments. The 74 departments are organized into 81 seniority units, most of which coincide with the structure of departments.[1] However, in the Coke Ovens Department, of particular interest here, there are four seniority units.

The facts as to discrimination were admitted by defendants in two extensive stipulations. These showed that both before and after the passage of the Civil Rights Act of 1964 blacks were treated unfairly at the Lackawanna plant in hiring, job assignment, apprenticeship and selection of supervisors. The following patterns of discrimination continued up to the time when the Government began its inquiry into Bethlehem's practices. In hiring, jobs were made available to whites rather than to blacks in a number of ways. There were no fixed or reasonably objective standards and procedures for hiring; the aptitude test scores of some white applicants were fraudulently raised; some white applicants were hired without testing; and whites were given preference in summer employment. Job assignment practices were even more reprehensible. Over 80 per cent of black workers were place 11 departments, which contained hotter and dirtier jobs in the pl Blacks were excluded from higher ing and cleaner jobs. All of the def ants were aware of this racial discri nation. Even within a department, pattern continued. In the Coke Ov Department the blacks were assigned the most part to the two poorest and least desirable of the four senio units. Similar preferential treatm was given to whites in the choosing apprentices and in the selection supervisors.

All of this is a very brief summary a general pattern of racial mistreatm that had existed at the Lackawa plant for many years. There is no n to continue with a further descripti It is enough to say that a sorry pict emerges, made no less so by the undou ed cooperation of Bethlehem with Government once the investigation commenced. The fact is that the Lac wanna plant was a microcosm of clas job discrimination in the north, maki clear why Congress enacted Title VI the Civil Rights Act of 1964.[2]

At trial, the major question whether the seniority and transfer p visions of the collective bargain agreement perpetuated the effects of years of discrimination. Up to a dec ago, seniority at the Lackawanna pl had been departmental rather th plant-wide. That is, for purposes layoff, recall and promotion senior had been based on the time spent wit a department or seniority unit rat than on the time elapsed from origi employment. In 1962, this was alte somewhat for purposes of layoff and call. "Pool areas" were established, c sisting of the lower paid jobs of one more departments; an employee abo to be laid off in his department cou exercise plant-wide seniority and tra fer into a "pool" job.

1. While "department" and "seniority unit" are not synonymous, we will treat them as identical except where otherwise indicated.

2. See generally M. Sovern, Legal Restraints on Racial Discrimination 3–8, 61–102 (1966); C. Silberman, Crisis in Black and White 234–238 (1964).

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Before 1962, employees had no right to transfer between departments. With the establishment of the pool areas, workers were allowed to use plant seniority to bid on job vacancies in another department sharing the same pool, if the employee was qualified to perform the work and the vacancy had not otherwise been filled. Usually such openings were filled by promoting the most senior worker in the job immediately below the vacancy. Therefore, the only jobs available for intra-pool transfers were generally at the low paid, entry level. In 1965, similarly limited plant-wide transfer rights became available allowing transfers to lower level jobs in any department that had not been filled by an intra-pool transfer.[3] Employees who transferred under either plan lost accrued seniority for purposes of promotion, and were paid at the rate for their new entry level jobs. Even these limited transfers were not permitted among the four seniority units of the Coke Ovens Department until 1968.

Before Chief Judge Henderson, the Government argued that the combined effect of these arrangements was to keep blacks in the jobs to which they had originally been assigned for racial reasons and that the seniority and transfer provisions of the labor agreements were therefore improper. Defendants argued that these practices were typical of the steel industry, were required for reasons of safety and efficiency and had not been instituted or continued for discriminatory reasons. Chief Judge Henderson, to a great extent, agreed with the Government. Thus, the judge found:

> In other words, an employee who chooses to exercise either of these transfer rights must forfeit all of the benefits of seniority which he had accrued in his pre-transfer position, such as pay rate, promotion opportunities, protection against demotion, job tion, and enter the new unit as a man, generally going to the entry job.
>
> The court finds as fact that transfer and seniority system ne ated in the 1962, 1965 and 1968 ter Agreements by the company union, operates (as described a in such a way as to tend to lo employee into the departmen which he has been assigned. lock-in effect becomes stronger employee's length of service inc in a department. This means th longer a Negro has worked in th and dirty department to which h admittedly discriminatorily ass the more he has to lose by tra
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> * * * * *
>
> The prohibition against tra [within the Coke Ovens Depart * * * was instituted for th pose of discriminating agains groes. Local 2601's acquie therein established that prohibi part and parcel of the Coke Ov niority system. The Coke Ove seniority system and proh against transfer had the purpo effect of segregating Negroes the Coke Ovens and denying equal opportunity of employm the Coke Ovens.

312 F.Supp. at 985–986, 989. C ing from these findings that the ity and transfer provisions ten perpetuate the effects of Beth discriminatory practices, the court held in substance that the "unlawful employment practices" Title VII. 42 U.S.C. § 2000e–2.

As for the admitted discrim practices in hiring and in job, ticeship and supervisory assig the district court, for the mo adopted the relief to which the

3. These transfer rights are embodied in an industry wide master agreement negotiated between representatives of the International Union and representatives of the steel industry. The local unions and the individual companies apply the master agreement in accordance with the cu and usages of each plant. The se and transfer provisions challenged i case were included in the 1962, 19 1968 Master Agreements.

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stipulated. The court ordered appellees to establish objective criteria for hiring and promotion, to administer the apprenticeship and related programs in a non-discriminatory fashion, and to report to the court and to the Government the steps taken to comply with the decree. As for the seniority and transfer provisions, the court expanded the contractual transfer rights of all employees working in the 11 departments that had been the focus of the discriminatory practices. Employees in these departments, who were hired before October 1, 1967,[4] were given priority transfer rights, under the collective bargaining agreement, into any of the other departments. Moreover, within the Coke Ovens Department, employees discriminatorily assigned to two seniority units were given similar priority transfer rights into the two other units of that department that contained more desirable jobs.[5] To further increase mobility, the judge also ordered defendants to diminish the number of pool-areas in the plant.[6]

However, the judge did not grant all the relief sought by the Government. The court refused to order that (1) future transferees from the 11 departments should be paid in their new jobs at a rate at least equal to their average hourly earnings in their former jobs,[7] and (2) in their new jobs, the transferees should get the benefit of plant rather than unit or department seniority for all purposes. The judge's principal reasons for denying such rate retention and seniority carryover apparently were that the present seniority and trans system was not a complete deterrent transfer, and that other employees w be treated unfairly and might bec disgruntled if the system were chan as the Government requests.

The Government appeals, claim that the order of the district court is some respects too broad and in oth too narrow. The most significant of objections are in the latter catego We discuss these and other issues Parts III and IV of this opinion. Part V, we summarize the order that believe should be entered.

II.

Before considering the appropriate lief for the violations found and e though there is no appeal either Bethlehem or the unions, we think it portant to discuss briefly Chief Ju Henderson's conclusions that the sen ity and transfer provisions of the col tive bargaining agreements violated tle VII of the 1964 Civil Rights A We do so because the judge dealt w basic issues in a Title VII case that r recur in other proceedings in this cuit.

Section 703(a) of Title VII, 42 U.S § 2000e–2(a), prohibits an emplo from discriminating against an emplo "with respect to his compensati terms, conditions, or privileges of ployment, because of such individu race * * *" or from limiting, se gating or classifying an employee any way which would deprive or tend deprive any individual of employm

4. This is the date when Bethlehem voluntarily ceased its discriminatory practices other than those embodied in the seniority and transfer provisions.

5. The court also prohibited Bethlehem from subjecting potential transferees under the decree to any unusual tests of their qualifications for the jobs to which they wished to transfer.

6. Defendants have apparently begun compliance with the district court's order. Moreover, they have voluntarily increased a transferee's "bump back" rights. A transferee now has an absolute right to return to his former department within 60 days without loss of seniority earned in that department. In addition, a transferee will continue to earn seniority in his former department for two years and, if laid off from his new department, may return to his former department with full seniority.

7. If the new department or unit does not have a job that pays as well as the transferee's former job, the Government requests that he be paid at the rate of the top job in the department.

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opportunities or otherwise adversely affect his status as an employee, because of such individual's race."[8] From Judge Butzner's seminal opinion in Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D.Va.1968), to the Supreme Court's recent and first decision on the merits of a Title VII race discrimination case, Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971), a basic question has been whether racially neutral practices that perpetuate the effects of past discrimination are "unlawful employment practice[s]" as defined in that section.[9] The issue before Chief Judge Henderson was whether the seniority and transfer system at the Lackawanna plant, although racially neutral on its face, violated the Act.

[1] The effect of Bethlehem's admitted, numerous discriminatory practices over many years was to force blacks into the 11 less desirable departments in the Lackawanna plant solely on the basis of race. Although these overt practices were finally discontinued after October 1, 1967—over two years after the effective date of Title VII and in response to governmental investigation—the seniority and transfer provisions perpetuated their effects in two ways. First, they tended to lock discriminatorily assigned employees into their jobs. In order to transfer to a formerly "white" department these employees were required to suffer an economic penalty, forfeiture of seniority rights and pay levels earned in the "black" department. The former was due to the use of departmental seniority, the latter to the fact that the transferee's new job was at the entry level in the new depa Thus, to obtain an opportunity t been denied them because of rac employees had to be willing to what was already theirs because ice in the plant. Second, a trans a "white" department would n able to reach the level of a wh ployee already there. For examp black and a white employee ha hired at the same time and the had been assigned to the more d "white" department, but the bla not been so assigned, the white to accumulate department or unit ity in that department but the bl not. Even if the black were gi chance years later to transfer "white" department, the earlier inatory job assignment had deni the chance to earn seniority up time in the "white" department. fore, the use of departmental or niority for purposes of promotio formerly "white" department co the effect of the earlier discrim practice. See Local 189, United makers v. United States, 416 F. 988–991 (5th Cir. 1969), cert. 397 U.S. 919, 90 S.Ct. 926, 25 108 (1970).

It is true that section 703(h) VII, 42 U.S.C. § 2000e–2(h) that "it shall not be an unlawful ment practice for an employer t different * * * terms [or] tions * * * of employment p to a bona fide seniority syste vided that such differences are result of an intention to discrimi cause of race * * *."[10] Chie

8. 42 U.S.C. § 2000e–2(c) defines as unlawful employment practices similar acts when done by a labor union.

9. See also Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970); United States by Clark v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir. 1969); United States v. Local 36, Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969); Local 189, Papermakers v. United States, 416 980 (5th Cir. 1969), cert. denied, 3 S. 919, 90 S.Ct. 926, 25 L.Ed.2 (1970).

10. 42 U.S.C. § 2000e–2(h) provid part, that:

Notwithstanding any other provis this subchapter, it shall not be an ful employment practice for an em to apply different standards of com tion, or different terms, condition

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Henderson held, 312 F.Supp. at 993, that this section does not apply to this case, reasoning that a seniority system based on earlier discriminatory job assignments into various departments is not "bona fide." See *Local 189, supra*, 416 F.2d at 988, 994–995; *Quarles, supra*, 279 F.Supp. at 514–519. The pervasiveness and longevity of the overt discriminatory hiring and job assignment practices, admitted by Bethlehem and the unions, compel the conclusion that the present seniority and transfer provisions were based on past discriminatory classifications. See generally Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598 (1969); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1155–1166 (1971); Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv.L.Rev. 1260 (1967). Accordingly, Chief Judge Henderson's conclusions that the continued use of the seniority and transfer provisions perpetuated discrimination and therefore violated the Act were surely correct.

III.

This brings us to the issue raised by this appeal: whether the district court should have ordered the rate retention and seniority carryover for transferees that the Government urged. Before considering the arguments of the parties, analysis of what the Government is not seeking may provide perspective. Government's complaint, in the fac long-seated and utterly indefensible cial discrimination against various ployees, did not ask for back pay for employee. Nor did it seek relief for potential employee who had not h hired because of race.[11] Continuing lations having been found, the Gov ment now seeks only greater incentiv job mobility for those present emplo who have been treated illegally in past. But the right of transfer or bid upward, under the Governme proposals, would not be unlimited or conditional. A transfer would only b fill vacancies; there would be no bu ing of "white" employees out of a In addition, the transferee would hav be qualified to fill the job and through the same progression as ot employees. There would be no right leapfrog over intermediate positi and bid for a job at the top. Thus, i clear that the relief sought by the G ernment is moderate.[12] In broad o line, the Government's argument is t the limited remedy of priority right transfer, ordered by the district cou does not remove the effects of past d crimination. If discriminatorily signed employees cannot keep in th new jobs their former rate of pay a seniority, few will transfer and th that do will suffer an economic pena and be forever behind their white c temporaries. In short, the reme granted below will not "insure the f enjoyment of the rights" secured by tle VII, 42 U.S.C. § 2000e–6(a).

privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. * * *

11. This characterization is true with one possible exception. The relief granted to remedy discrimination in the apprenticeship program apparently applies to blacks who applied but were never employees at the Lackawanna plant.

12. For discussions of possible remedies under Title VII, see Cooper & Sobol, *supra*, at 1632–36; Developments in the Law, *supra*, at 1163–1164, 1209.

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In response to this, appellees make a number of arguments.[13] They say that there is no evidence that black members of six of the 11 departments were discriminatorily assigned or that their departments are less desirable; that even in the remaining five departments, many would have been assigned there in any event; that the scope of relief was for the discretion of the district court judge and that he did not abuse it; that alteration of the plant's seniority system is prevented by section 703(h) of Title VII; and that the Government's proposed remedy would seriously undermine morale, efficiency and safety in the plant. None but the last of these arguments requires extended discussion.

[2] The point that as to six departments there is no evidence of discrimination or that the jobs are less desirable borders on the frivolous. It is enough to say that the district court found to the contrary, and appellees have not appealed from those determinations. As to the other five departments, it is true that some of the black employees might have been assigned there even under the best of systems. But there is no apparent way of knowing that, or determining now who they would be,[14] and appellees offer none. The discrimination found illegal here was to a group; group remedy is therefore appropriate. Cf. United States v. Board of Education, 372 F. 2d 836, 866 (5th Cir. 1966), aff'd on rehearing *en banc*, 380 F.2d 385, cert. denied, 389 U.S. 840, 88 S.Ct. 77, 19 L.Ed. 2d 104 (1967).

[3] Regarding the scope of review, there apparently is a dispute between the parties with the Government claiming that we are not limited to searching for abuse of discretion. However, we do not think it necessary to resolve the issue. In denying the relief sought by the Government, Chief Judge Henderson relied in substantial part on the fact t the present seniority and transfer sy tem was not "a complete deterrent" transfer. 312 F.Supp. at 984. Ho ever, this puts it backwards. Even discriminatory system that did not co pletely deter transfers but only discou aged them should be changed. The co rect criterion in fashioning a reme under Title VII is what would be nec sary to insure sufficient incentive transfer so that the effects of past d crimination would not be perpetuat In addition, the test here must also l to advancement after transfer, so t an employee can achieve his "right place." That is, relief under the should give discriminated employees future vacancies arise, the opportun to obtain the jobs that they would h earned had there been no discriminati *Local 189, supra*, 416 F.2d at 988; Co er & Sobol, *supra* at 1602–1629; N *supra*.

[4] Rate retention and seniority c ryover have both been used to corr continuing discriminatory effects si lar to those caused by the seniority transfer provisions at the Lackawa plant. Griggs v. Duke Power Co., F.2d 1225, 1236–1237 (4th Cir. 19 (seniority carryover), rev'd on ot grounds, 401 U.S. 424, 91 S.Ct. 849, L.Ed.2d 158 (1971); Robinson v. Lo lard Corp., 319 F.Supp. 835, 839, (M.D.N.C.1970) (rate retention and s iority carryover); Clark v. Ameri Marine Corp., 304 F.Supp. 603, 608 D.La.1969) (rate retention and senio carryover); United States by Clar Local 189, United Papermakers, 30 Supp. 906, 919, 923 (E.D.La.) (rate tention and seniority carryover), a 416 F.2d 980 (5th Cir. 1969), cert. nied, 397 U.S. 919, 90 S.Ct. 926, 2 Ed.2d 108 (1970); *Quarles, supra*, F.Supp. at 521 (seniority carryo

13. For purposes of convenience in discussion, we have not treated separately the arguments of the company and the unions, although they do differ in emphasis; e. g., the company stresses the effects of the Government proposals on safety and efficiency in the plant; the union discuss the effect on other employees.

14. Appellee unions concede as much. Br of Appellee unions at 20–21.

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...ever will remove any racially based constraints against transfer and allow the transferee, if qualified, to be promoted within a reasonable time to his "rightful place," a job in a "white" department equal to that of his white contemporary who did not suffer a discriminatory assignment, without displacing another employee from his present job. Unless some rate retention and seniority carryover is granted to a transferee, the incentive to transfer will remain low for the very reasons that the seniority and transfer provisions of the plant were found to have perpetuated discrimination. That is, a discriminatorily assigned employee will have little incentive to transfer if he loses money or job seniority by doing so. Indeed, appellees do not argue that seniority carryover and rate retention will not be an important inducement to transfer. As indicated below, they argue just the reverse, that the incentive will be too great. Therefore, since we believe that the district court used erroneous criteria in applying Title VII, the order below should be modified even under the abuse of discretion test of review.

[5] Appellees also argue that the seniority system at the plant is protected by section 703(h) of the Act, 42 U.S.C. § 2000e–2(h), quoted in note 10 *supra*, so that any alteration of seniority rights to grant the relief requested by the Government would be improper. There are a number of reasons why we decline to accept this view. The statutory exception only applies to a "bona fide" seniority system, and Bethlehem has not appealed from the basic conclusion of the district court that the seniority sys... did not deserve that description. E... more important, the district court's ... termination was, as already indica... obviously correct. Moreover, relief ... ready granted, transfer priority for ... ployees in the 11 departments, is it ... an alteration of the seniority syst... Yet, Bethlehem raises no objection ... this remedy even though logically i... subject to the same defect as the a... tional relief still sought by the Gov... ment. Bethlehem also relies on porti... of the legislative history of the Act ... which Senators Clark and Case, co-f... managers of the bill in the Senate, i... cated in an interpretative memoran... that legislative intent was not to ... blacks "special seniority rights at ... expense of the white workers h... earlier." [15] That memorandum, h... ever, in focussing on formerly wh... only plants, seems to say at most ... the seniority of a white on a job will ... be affected by the claims of blacks h... after he was. As we make clear be... in discussing the precise relief to wh... we believe the Government is entit... the discriminatorily assigned emplo... who transfer will not receive "special ... niority rights" or "super-seniori... Their seniority rights will be no gre... than that accorded more fortunate ... ployees. Both groups will bid aga... each other for vacancies on the basi... plant-wide seniority; an earlier-h... white employee will have greater sen... ity than a later-hired black. In ... event, essentially we agree with Ju... Butzner that "Congress did not int... to freeze an entire generation of N...

15. The interpretative memorandum stated as follows:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. *He would not be obliged*—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, *once N... groes are hired, to give them speci... seniority rights at the expense of t... white workers hired earlier.* (Howeve... where waiting lists for employment ... training are, prior to the effective da... of the title, maintained on a discrimin... tory basis, the use of such lists after t... title takes effect may be held an unla... ful subterfuge to accomplish discrimin... tion.) [Emphasis added.]

110 Cong.Rec. 7213 (1964). See al... *id.* at 7207.

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employees into discriminatory patterns that existed before the act." *Quarles, supra*, 279 F.Supp. at 516. Accord, *Local 189, supra*, 416 F.2d at 987–988. See Cooper & Sobol, *supra* at 1607–1614.

[6, 7] Appellees' last group of objections are more substantial. Appellees fear that the irresistible advantage of rate retention and seniority carryover will lead to a wholesale depopulation of the 11 departments, that dangerous, skilled jobs will be filled by incompetents increasing the injury rates, that the preferential treatment of some employees will lead to labor unrest, and that the increased cost of production will render the plant uncompetitive. In sum, appellees claim that the Government's requested relief will destroy the efficiency and safety of the Lackawanna plant and that modification of present practices and of the district court order is therefore prohibited by what has become known as the "business necessity" exception to the requirements of Title VII. That doctrine is not referred to in the Civil Rights Act of 1964, although section 703(h), quoted in note 10 *supra*, is clearly concerned with the ability of a business to continue to operate efficiently. The doctrine has been expressed as follows:

> When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, non-racial business purpose.

Local 189, supra, 416 F.2d at 989. We accept that definition, but in the context of this case the "business necessity" doctrine must mean more than that transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of p... crimination. Clearly such a result is not correct under Title VII. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970). Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. *Local 189, supra*, 416 F.2d at 989. If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued.

Thus, it is not enough that the seniority system at the Lackawanna plant is, as appellees argue, meant to insure orderly and efficient job mobility so that "after transfer the employee will advance in his new line of progression in an orderly manner, developing and building on new skills as he moves from job to job." [16] While these are legitimate non-racial business purposes that directly serve safety and efficiency, they are the goals of any reasonable transfer and seniority system and do not by themselves prevent its alteration. The seniority and transfer provisions at the plant have been found to perpetuate past discrimination, and the use of rate retention and seniority carryover will substantially eliminate these discriminatory effects. Therefore, the crucial question must be whether the basic goal of the seniority system will necessarily be frustrated by these remedies. It is perfectly clear that this will not be the case. An unqualified worker need not be promoted whether or not he is a transferee under the district court's order. This is expressly provided in the 1968 Master Agreement and nothing in the district court's or in our opinion alters that fact.[17] Transferees will not move i...

16. Brief for Appellee Bethlehem at 30.

17. Bethlehem argues that the ability requirement in the collective bargaining agreement, Art. X, § 1, 1968 Master Agreement, will not afford sufficient protection because it is too difficult to apply and because of the narrow interpretation given to it by arbitrators under the collective bargaining agreement. We agree that it is probably easier to advance employees solely on a length of service ...

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rectly to high or middle level jobs nor displace workers from jobs presently held, nor jump from low to higher jobs.[18] Under the Government's proposals, a transferee has priority rights only with respect to jobs in formerly "white" departments that are not otherwise filled in the normal seniority procedures. Accordingly, transfers will be to low-skilled, entry-level jobs. A transferee will be promoted from those jobs in the normal job-by-job fashion, moving up the progression line only as a job immediately above him becomes vacant.

Appellees also argue that the morale of employees who did not suffer discrimination will suffer if rate retention and seniority carryover are ordered. But in the context of this case that possibility is not such an overriding business purpose that the relief requested must be denied. Assuming *arguendo* that the expectations of some employees will not be met, their hopes arise from an illegal system. Moreover, their seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification. *Quarles, supra*, 279 F. Supp. at 520. Cf. Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964). Indeed, appellees themselves recognized this when they provided in the 1968 Master Agreement[19] for adjustment of conflicting seniority claims in the event of the mergers of plants or departments. If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to w the Act is directed. Cf. Monro Board of Commissioners, 391 U.S. 88 S.Ct. 1700, 20 L.Ed.2d 733 (19

Appellees claim that rate reten will destroy an industry wide Job Cl fication Program,[20] but we do not ag Exceptions to the "equal pay for e work" doctrine have been made in past. When the program was first into effect, "red circle rates"—ano way of describing limited rate reten —were common because it was ag that no employee should suffer loss pay merely because his job was cl fied at a lower rate. The 1968 Ma Agreement[21] provided that an empl temporarily assigned for Bethleh convenience to a job other than his r lar job, when work is available to hi his regular job, "shall receive the es lished rate of pay" for either the te rary job or his permanent job, whic er is higher. The temporary rate re tion requested here[22] is not unpr dented either at this plant or in o instances where Title VII relief been granted. See cases cited at p. 3 *supra*.

We do not say that appellees' conc over the effects of rate retention seniority carryover are manufactur advanced in bad faith. But most them can be met by the carefully lim order suggested by the Governm Thus, appellees fear that some tr ferees, content with doing a relati easy job at a high rate of pay, would cline any further promotions, and seniority carryover would allow tr ferees to "bump" employees from t

quirement, but we do not accept Bethlehem's self-serving statement that enforcement of the ability requirement is useless. Its presence in the agreement indicates that one party, probably Bethlehem, thought it was useful.

. The Government has stipulated that each job in a line of progression provides training for the next highest job.

. Art. X, § 9.

. Under the program, begun in 1944, jobs in the steel industry are classified based on 12 specific criteria, includi working conditions, hazards and respons bilities. Each job is graded on a nume ical scale and equal wages are paid f jobs with the same classification.

21. Art. IV, § 5.

22. This relief will be temporary becau the transferee will most likely advan quickly to a job paying as much as more than his red circle rate. See 3 F.Supp. at 985.

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jobs. But, if a transferee knows that he will lose his red circle rate if he refuses a promotion, as the Government suggests, there will be little incentive to stay on a job requiring little effort but giving high pay because of rate retention. Moreover, because plant seniority will only be used in bids upward for vacancies occurring in the normal course of business, i. e., vacancies caused by the death, retirement or transfer of an incumbent or by creation of a new job, an employee will not be "bumped" out of his job in such situations by a transferee. Regarding displacements caused by layoffs, the Government suggests that, as workers are recalled following a layoff, all employees should assume the same positions relative to each other as they held immediately prior to the layoff. Although plant seniority of transferees will remain as a factor in layoffs, this suggestion will limit the speed with which a transferee can be promoted and the unsettling effects of seniority carryover during periods of layoff and recall. Other fears of appellees are based upon inaccurate assumptions, e. g., that a transferee can go into a job for which he is not qualified or that transferees will have "super-seniority." In short, upon a careful examination of the Government's proposals and the company's past practices, we conclude that the business necessity doctrine does not require denial of the proposed relief.

Appellees also rely on the decision of the Hearing Panel in the Matter of Bethlehem Steel Corporation, OFCC Dkt. No. 102–68, issued on December 18, 1970, and the decision in United States v. H. K. Porter Co., 296 F.Supp. 40 (D. C.Ala.1968), appeal docketed, No. 27,703, 5th Cir. March 14, 1969. The former concerned the seniority and transfer provisions in use at Bethlehem's Sparrows Point (Maryland) plant. Under Executive Order 11246, companies that deal with the federal government are required to include in their contracts a pledge that they will not discriminate against any employee "because of race, creed, color, or national origin."[23] The Office of Federal Contract Compliance (OFCC) of the United States Department of Labor is charged with the responsibility for assuring that this pledge is obeyed. The OFCC charged Bethlehem with violating the pledge because, *inter alia*, the seniority system at Sparrows Point perpetuated the effect of the company's prior policy of discriminatorily assigning employees. Bethlehem refused to comply with the OFCC's direction that blacks be allowed to transfer with rate retention and seniority carryover, and requested a hearing. The Hearing Panel's decision essentially agreed with the district court's opinion in this case.[24] The Panel found that the seniority system did perpetuate the effects of past discrimination but held that the rate retention and seniority carryover provisions were not appropriate relief, because of the exigencies of business necessity. One Panel member dissented on the relief issue.

We agree that the issues and facts involved in the Sparrows Point decision, although arising in the context of a compliance hearing under Executive Order 11246 rather than a Title VII suit, are similar to those in this case. For reasons stated above, however, as well as in the dissent to the Panel's decision, we do not find persuasive the Panel's analysis of the business necessity exception. The Panel found support for its conclusion in Whitfield v. United Steelworkers of America, Local 2708, 263 F.2d 5[illegible] (5th Cir.), cert. denied, 360 U.S. 902, 79 S.Ct. 1285, 3 L.Ed.2d 1254 (1959), as *H. K. Porter, supra*, although it did "not accept the legal reasoning and theory of the two cases," and relied heavily on the district court opinion in this case. *Whitfield* construed a union's duty of fair representation under the doctrine

23. 3 C.F.R. 339, 340 (1964–65 Comp.).

24. The Panel decision is submitted to the Secretary of Labor who, after receiving the written positions of the parties, will decide whether to adopt the Panel's conclusions.

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teele v. Louisville & N. R. R., 323 U.S. 92, 65 S.Ct. 226, 89 L.Ed. 173 (1944); s effect on the scope of relief to be ranted in Title VII cases, however, has een limited by the Fifth Circuit. Unit- States v. Hayes International Corp., 5 F.2d 1038, 1042 n. 6 (5th Cir. 969). *H. K. Porter*, now on appeal the Fifth Circuit, is not in accord ith a majority of the decisions and as been criticized.[25] Moreover, it n be distinguished from this case. here the district court found that the niority system did not violate Title II because it did not perpetuate the ef- cts of past discriminatory assignments locking employees into their original bs. 296 F.Supp. at 64. Also, in that se, the Government sought, *inter alia*, ant-wide bidding for jobs, relief that uld avoid having transferees advance rough a line of progression of func- nally interrelated jobs, each one pro- ding training for the next. In this se, however, the remedy sought would t allow a transferee to leapfrog over os in a line of progression.

IV.

[8, 9] Accordingly, we believe that e relief requested by the Government th regard to seniority carryover and e retention should have been granted. e Government also raises three other ues on appeal. It claims that the dis- ct court should have extended the re- f to employees who had been discrimi- torily assigned to the 11 departments thereafter had exercised their limit- right to transfer and, therefore, are within the scope of the order. We ree. These employees originally suf- ed the same discrimination as those o have not transferred. They should be denied remedial relief, either as rate retention or as to seniority mere- because they were not completely de- red from transferring. They still fer the effects of discrimination be- se they are unable to reach the same level as their white contemporaries. *Quarles, supra*, 279 F.Supp. at 521.

[10] Second, the Government c tends that it was error for the dist court to extend relief to white employ in the 11 departments, who the dist court found were also discriminato assigned before October 1, 1967. T court justified this finding by cit some evidence which showed at m that at some indeterminate time in past certain ethnic groups congrega in certain departments because the n in charge "tended to hire * * * p ple who were friends of his or from ethnic community * * *." This far short of proof that any of the wh employees in the 11 departments w there because they could not obtain j elsewhere in the plant. In brief, th was simply insufficient evidence to s port the district court's finding that of the whites in the 11 departme were ever the victims of discriminat prohibited by Title VII.

[11] Finally, the Government arg that paragraph 7 of the district cou order was error insofar as it exten relief to white applicants who were nied entry to the apprenticeship p gram during the period January 1, 1 to October 1, 1967, and who were least as qualified as the least qualif white accepted during that same peri Based on the stipulated facts, the d trict court entered a pre-trial order s ting forth the relief, agreed to by Government and Bethlehem, that was be included in the final decree of per nent injunction. Although the pre-t order relief based upon the discrimi tion in the apprenticeship program plied to "[e]ach Negro applicant for apprenticeship," the final order appl to "[e]ach applicant." We agree w the Government that no reason was g en for the change and that there was proof that Bethlehem rejected any wh applicants to the apprenticeship progr on the basis of "religion, sex, or natio origin." Accordingly, paragraph 7

25. E. g., Cooper & Sobol, *supra* at 1622–1623, 1627–1628.

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the district court's order should apply only to rejected black applicants.

V.

In conclusion, the objective of the order to be entered here must be to remove the discriminatory effects of a transfer and seniority system that violated the Act. Appellees have not shown that the system in use at the Lackawanna plant is so essential to safety and efficiency that it cannot be modified in the ways suggested by the Government. On the contrary, a carefully drawn order providing for rate retention and seniority carryover can protect both the rights of employees who have suffered discrimination as well as the legitimate business interests of the appellants.

An appropriate order here should grant an employee who has been discriminated against ("a transferee"), at least the following additional relief: (1) A transferee shall receive, in his new position, pay equal to the pay in his former permanent position and shall continue to be so paid until he reaches a position whose pay scale is greater. If no job in his new department or unit has a rate as high as his former position, then he shall receive the rate of the highest level job in that department or unit. Because the rate retained is that of the transferee's permanent job, he shall not retain any temporary pay increase if he transfers after a temporary promotion. (2) A transferee shall be permitted to exercise plant seniority for all purposes following transfer, except as otherwise set forth herein. When a transferee competes on the basis of seniority for vacancies occurring in the normal course of business, seniority for all bidders shall be computed on the basis of plant, rather than unit or department, seniority. Only workers qualified to fill a higher job may use plant seniority to advance. As workers are recalled after a layoff, all employees shall assume the same positions relative to each other as they held immediately prior to the layoff. (3) A transferee's right to transfer with seniority carryover and rate retention may be exercised only once, and only during the next two years. If he exercises that right within that period, the transferee's protection of seniority carryover and rate retention shall continue in accordance with the other provisions in the order. (4) A transferee shall lose his privilege of rate retention if he refuses a promotion in his new unit or department.[26]

While the district court order, so modified, may cause inconvenience or annoyance, we believe that it will not disrupt the safety and efficiency of the Lackawanna plant. Because a transferee will have only one opportunity of limited duration to transfer to a formerly "white" department, the Lackawanna plant will not be thrown into a chaotic game of musical chairs. There will be no right to transfer on an "hour-to-hour and day-to-day basis," as appellees fear. Nor will any employee have superseniority or be entitled to a job for which he is not qualified. But the order so modified will give an employee who has suffered discrimination the opportunity to reach his "rightful place" in the plant. That result will accord with the noble purpose of the Civil Rights Act of 1964 to eradicate racial discrimination in employment in the north as well as in the south. We believe that the order as modified is reasonably designed to accomplish that end and is necessary to its fulfillment.

Case remanded for entry of a new order consistent with this opinion.

26. Of course, we do not preclude the parties from agreeing to other changes in the order or the district court from changing the order in other respects for purposes of clarification.

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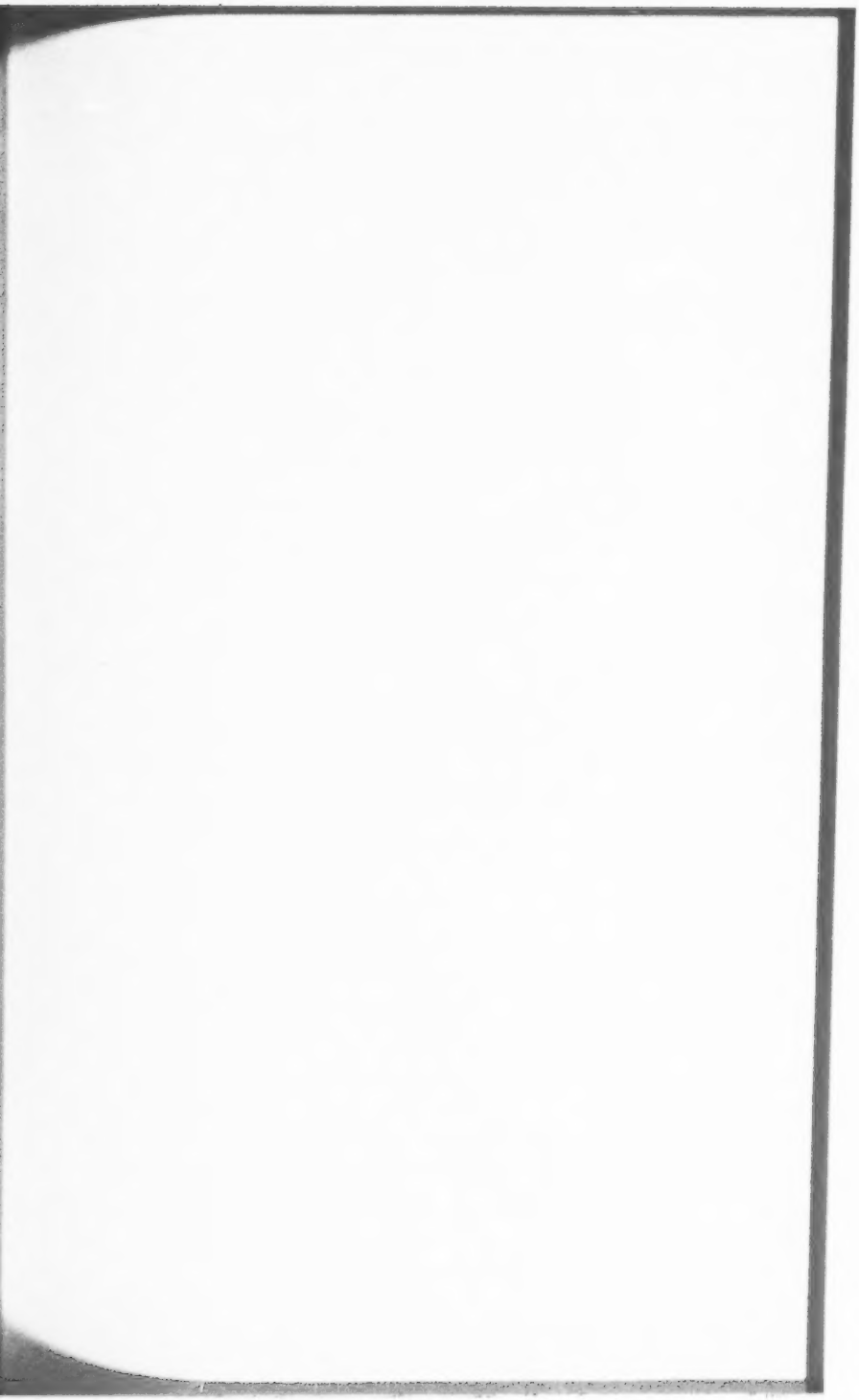

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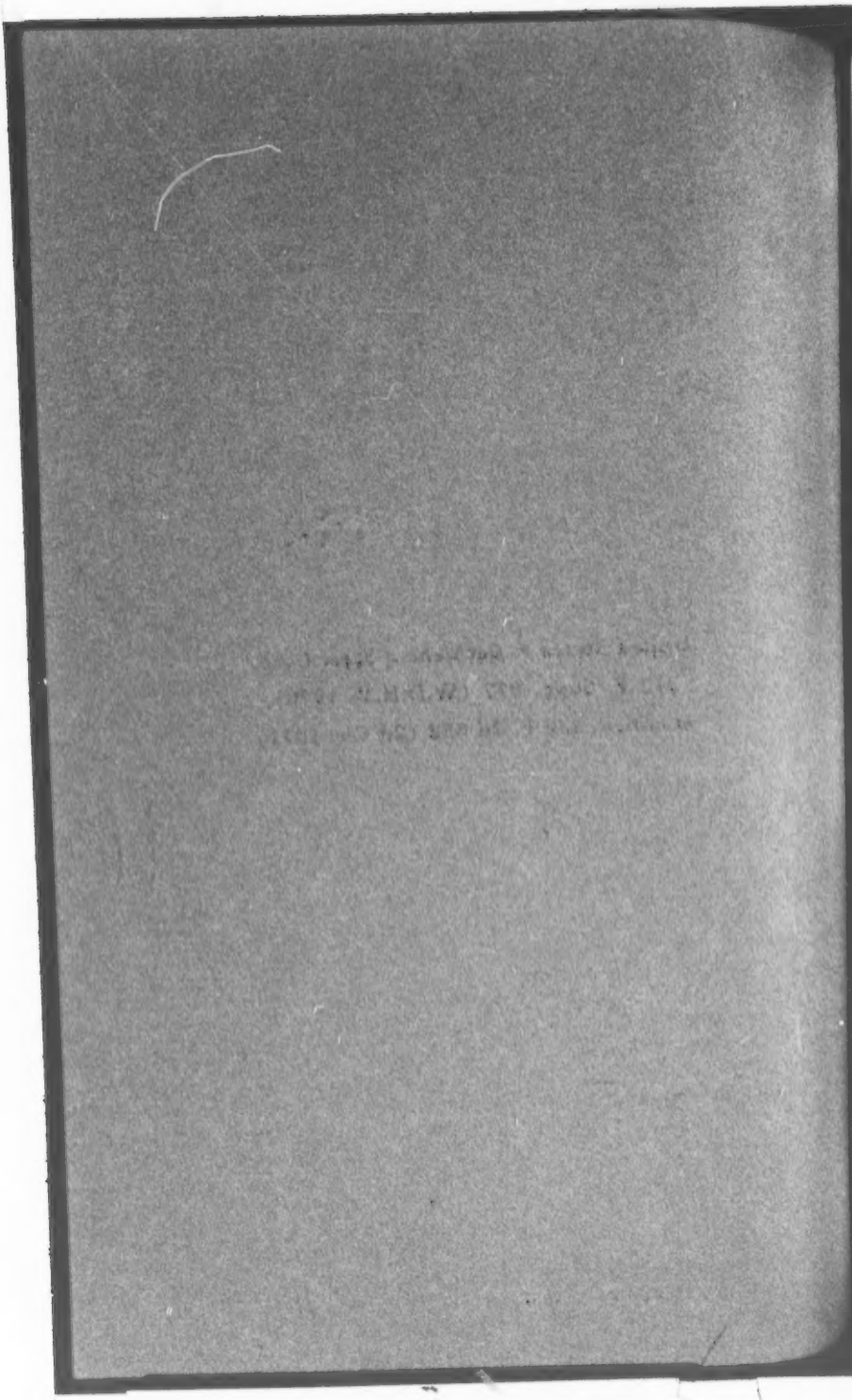
United States v. Bethlehem Steel Corp.
312 F. Supp. 977 (W.D.N.Y. 1970),
modified, 446 F. 2d 652 (2d Cir. 1971)



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ITED STATES of America, by Ramsey LARK, Attorney General, Plaintiff,

v.

THLEHEM STEEL CORPORATION, corporation, Local 2601, United Steel-orkers of America, Local 2602, Unit-Steelworkers of America, Local 03, United Steelworkers of America, ocal 2604, United Steelworkers of merica, Local 3144, United Steelwork-s of America, and the United Steel-orkers of America, Defendants.

Civ. 1967–432.

United States District Court,
W. D. New York.
April 13, 1970.

Action against steel company and on for relief against racially discrim-ory employment practices. The Dis-t Court, John O. Henderson, Chief ge, held that steel company and union ch had engaged in racially discrim-ory job assignment, reenforced by sfer and seniority practices which led to lock Negroes into less desirable , would be required to afford right ransfer to all employees on basis of ority, without rate retention or se-ity carry-over, and to reduce number ransfer "pools".

Order accordingly.

ivil Rights ⇐3

Steel plant's apprenticeship system ing employment opportunity contin-upon status which Negroes were ally prevented from achieving, due to prior discriminatory job assign ment, was discriminatory in violation o Civil Rights Act of 1964, while systen might properly be applied to plant de partment to which Negroes were com monly assigned. Civil Rights Act o 1964, §§ 701 et seq., 707(a), 42 U.S.C.A §§ 2000e et seq., 2000e–6(a).

2. Labor Relations ⇐179

Even if union membership had voted to retain no-transfer provision in senior ity agreement, union would still have had duty to negotiate system that would al leviate racially discriminatory assign ment patterns.

3. Labor Relations ⇐221

Union which had notice of steel plant's racially discriminatory practices in job assignment and transfer had duty to take whatever steps were lawful to alleviate discrimination and effects o discrimination upon its Negro members.

4. Civil Rights ⇐3

Upon showing that steel company and union had taken steps, with respect to transfer among seniority units in coke ovens department, which extended com pany's prior discriminatory practices, court would order that persons in least desirable units be offered first op portunities to transfer to vacancies in other units based upon department se nority, taking entry level jobs. Civil Rights Act of 1964, § 703(h), 42 U.S. C.A. § 2000e–2(h).

5. Civil Rights ⇐3

Steel company's conduct, before en actment of 1964 Civil Rights Act, with respect to racial discrimination in job assignment and transfer, could be con sidered in determining whether present practices of company and union were illegal or tended to perpetuate past dis criminatory practices, especially where policies which appeared to be racially neutral were claimed to be part of pat tern or practice of discrimination. Civ il Rights Act of 1964, §§ 701 et seq., 707(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–6(a).

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6. Civil Rights ⇐3

Where Civil Rights Act provisions relating to employment discrimination are violated, racially neutral practices may be prohibited or changed because they build upon foundation of pre-Act discrimination and tend to have present discriminatory effects. Civil Rights Act of 1964, §§ 701 et seq., 707(a), 42 U.S. C.A. §§ 2000e et seq., 2000e–6(a).

7. Injunction ⇐127

Evidence of statistical probability may be considered by finder of fact in determining questions presented in action to enjoin alleged employment discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐3

Where discriminatory employment practices were admitted and continued beyond effective date of 1964 Civil Rights Act, court may alter by decree seniority system which itself may be racially neutral on its face, even though system developed without regard to racial considerations. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e–2(h).

9. Civil Rights ⇐3

It is not necessary to prove that intention to discriminate existed at time of allegedly discriminatory employment practices, and all that is necessary to prove intention is demonstration that conduct is not accidental, inadvertent, or heedless, or arises from mistake. Civil Rights Act of 1964, §§ 701 et seq., 707(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–6(a).

10. Civil Rights ⇐3

"Bona fide", within 1964 Civil Rights Act provision exempting variance in conditions of employment pursuant to bona fide seniority system, does not exempt from adjustment seniority system based on discriminatory practices where proof shows violation of Act after its effective date and seniority system perpetuates effects of discrimination. Civil Rights Act of 1964, § 703(h) U.S.C.A. § 2000e–2(h).

See publication Words and Phrase for other judicial constructions an definitions.

11. Civil Rights ⇐13

In action against steel company union for relief against racially criminatory employment practices w preceded and followed effective dat Civil Rights Act, court was empow to fashion decree to correct presen fect of past discrimination, while a pating collateral effects so as to avoi equities. Civil Rights Act of 196 707(a), 42 U.S.C.A. § 2000e–6(a).

12. Civil Rights ⇐13

That Attorney General, for tical results, had limited his Civil R Act case to Negroes did not re that court be so limited in providin lief. Civil Rights Act of 1964, § 7 seq., 42 U.S.C.A. § 2000e et seq.

13. Civil Rights ⇐3

Steel company and union which engaged in racially discriminatory assignment, reenforced by transfer seniority practices which tended to Negroes into less desirable jobs, w be required to afford right of tra to all employees on basis of seni without rate retention or seni carry-over, and to reduce numbe transfer "pools". Civil Rights A 1964, §§ 701 et seq., 707(a), 42 U.S §§ 2000e et seq., 2000e–6(a).

K. William O'Connor, Civil Right vision, Dept. of Justice, Washi D. C. (Louis M. Thrasher, Washi D. C., of counsel), for plaintiff.

Cravath, Swaine & Moore, New City (Thomas D. Barr, New York Hodgson, Russ, Andrews, Woods & year, Buffalo, N. Y., of counsel), f fendant Bethlehem Steel Corp.

Bredhoff, Gottesman & Cohen, ington, D. C. (Michael Gottesman, ington, D. C., of counsel), for defe United Steel Workers of Ameri

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Thomas E. Krug, Buffalo, N. Y., for defendant Local Unions Nos. 2601, 2602, 2603, 2604 and 3144.

JOHN O. HENDERSON, Chief Judge.

This case involves violations of the equal employment provisions (Title VII) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). The United States charged the Bethlehem Steel Corporation and, in an amended complaint the United Steelworkers of America and local unions of the United Steelworkers, with engaging in a "pattern or practice" of racial discrimination in their employment practices at Bethlehem Steel Corporation's Lackawanna Plant (hereinafter "Plant").

Most of the facts were stipulated.* Bethlehem admitted discrimination against Negroes in most phases of its employment practice and much of the relief requested by the government was agreed to and entered as part of the pre-trial order.

Bethlehem Steel Corporation's Lackawanna Plant is its second largest steel plant—the fourth largest in the country. Its normal working force consists of about 18,000 people with an annual payroll of around 135 million (DC Ex. 1, p. 10).

DISCRIMINATION IN GENERAL HIRING AND ASSIGNMENT PROCEDURES

The admitted activity of the company regarding its discriminatory employment practices creates a sorry image.

Until September 1967, the Plant did not uniformly apply objective standards and procedures for the hiring and assignment of new employees. Bethlehem has admitted, for example, that the Plant's employment office falsely raised the general aptitude test scores of some white applicants, hired some white applicants without testing, granted preferential treatment to white applicants for summer employment and, in general, provided employment opportunities to white applicants which were not generally provided to Negro applicants. For example, as mentioned below, the Supervisor of Employment consistently preferred residents of Angola, an all-white suburb, for employment opportunity. The Plant also followed a practice of generally assigning Negroes to the hotter, dirtier and less desirable jobs and departments and not assigning Negroes to other jobs and departments to which white employees have been traditionally assigned. In those instances where Negroes were initially assigned by the personnel department to traditionally white departments, they were discriminatorily rejected by supervisory personnel in those departments. The Supervisor of Employment believed that Negroes could stand heat better than whites.

Further detailing of the admissions contained in the stipulations serves no useful purpose but the court finds as fact the facts as set forth in the stipulations of July 18, 1968 and September 23, 1968. The court will now turn to the specific policies of discrimination which were practiced at the Bethlehem Plant.

It has been admitted that the company discriminated in hiring and assignment of employees until October 1, 1967. Until that time, the employment office at the Plant, through the Supervisor of Employment and the clerk interviewers, had the power to reject applications for employment with almost absolute discretion. Moreover, it is admitted that prior to October 1, 1967, the Plant failed to implement fixed and reasonably objective standards and procedures for hires; the employment officers, by falsely raising aptitude test scores of some white applicants, failing to test some white

* One stipulation of facts was filed with the court on July 18, 1968, and hereinafter will be referred to as Stip. # 1. A second stipulation of facts was filed September 23, 1968, and will be referred to hereinafter as Stip. # 2. This court's pre-trial order of September 24, 1968, found stipulation # 1, except ¶ 13 (b), (d) and (e) to which stipulations the unions did not acquiesce, as facts.

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applicants and otherwise granting preferential treatment to white applicants, provided employment opportunities to white applicants not generally provided to Negro applicants.

Further admitted examples of this follow:

(a) Preferential treatments in new hiring and assignment was accorded by the Supervisor of Employment to residents of Angola and all white suburban areas near Lackawanna. This practice was known to the Office of Management's Representative who is responsible to Plant management who is, in turn, responsible to management at the corporate level.

In the summer of 1966, 26 Negroes out of 1100 summer employees were hired; in 1967, 12 out of 478.

Management and other supervisory personnel of the Plant compiled a "Golden List" designated "AU" (the chemical symbol for gold) which contained the names of a selected group of prospective summer employees who were given preferential treatment including assurance of a job, rapid processing and favorable job assignment. The employment applications of such persons were designated with the symbol "AU." No Negro has ever been on the "Golden List."

(b) The Plant followed a pattern or practice of discrimination in assignment of Negroes and whites to departments between July 2, 1965 and October 1, 1967, by assigning 20% of newly-hired whites and 50% of newly-hired Negroes to five departments of the 82 departments in the Plant as follows: 404 (Brickmason-Labor Unit), 503 (Blast Furnace Sintering), 512 (Coke Oven), 520 (Blast Furnace) and 530 (Steelmaking). These five departments then comprised only 19% of total Plant hourly paid employees but are admittedly among the hotter and dirtier places of employment in the Plant. The assignment of Negroes to these five departments, it is admitted, was in part premised on the view of the employment office that Negroes could stand the heat better than white employees (Stip. [illegible] 12–13).

(c) Departments which have been traditionally white have remained so because of the Plant's practice which continued to October 1, 1967, of not assigning Negroes to those departments or to the practice of some white supervisory personnel of rejecting Negroes when they were assigned to those departments (Stip. p. 15), prior to October 1, 1967.

The result of Bethlehem's racial assignment has been that Negroes have been involuntarily concentrated in only the following eleven of the Plant's 82 departments: Departments 404 (Brickmason-Labor), 406 (Yard), 503 (Sintering Plant), 512 (Coke Ovens), [illegible] (Blast Furnaces), 530 (Steelmaking), 612 (44"–32" Mills), 620 (Billet Yard), 631 (12"–10"–8" Bar Mills), 660 ([illegible] Mill) and 662 (14" Mill). As of October 21, 1967, these eleven departments contained 83.6% of all Negro employees in the Plant.

Since at least 1961, the union has been aware that most of the Negroes in the Plant were concentrated in the eleven departments and that this concentration resulted from Bethlehem's assignment policies. In short, all the defendants knew of the racially discriminatory assignment of Negroes in the Plant.

In addition to the assignment of most Negroes to the eleven departments, Bethlehem excluded Negroes from the higher paying and cleaner departments of the electrical and mechanical divisions. Bethlehem stipulated that "until September 1967 the Plant pursued a policy or practice of excluding qualified Negroes from the Electrical Division departments and had on occasion hired and assigned whites to those departments without regard to their qualifications. As of December 8, 1967, the Division employed 1,364 persons, of whom only eleven were Negro." Similarly, Bethlehem has admitted that "until September 1967, the Plant pursued a policy or practice of excluding qualified Negroes from certain Mechanical [illegible]

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As of December 8, 1967, the Division employed 3,690 persons, of whom 341 were Negro. Two hundred forty-eight of the 341 Negroes were in a non-mechanical laborer unit in the Brickmason Department, the only Mechanical Department which has a large non-mechanical labor unit." The average pay of employees in the Laborer unit of the Brickmason Department is significantly lower than the average pay for craft workers in the same unit.

The union has been aware, since the effective date of Title VII of the Civil Rights Act of 1964, of the pattern of racial assignments to the various departments of the Lackawanna Plant.

SELECTION OF SUPERVISORY EMPLOYEES

Until September 1967, the Plant admitted pursuing a practice of generally excluding Negroes from supervisory positions by basing promotion on essentially subjective determinations. Additionally, in some instances the Plant transferred white employees from traditionally white departments into predominantly Negro departments to assume supervisory positions. The practice has restricted the number of Negro supervisory personnel. In short, defendant Bethlehem engaged in racially discriminatory conduct with regard to hiring, assignment and promotion both prior to and after the effective date of Title VII. These discriminatory employment practices continued up to September 1967 when the United States began its inquiry into Bethlehem's practices.

Nothing could be clearer than that Bethlehem, as it admitted, has engaged in an unlawful pattern and practice of racial discrimination in employment in violation of Title VII of the Civil Rights Act of 1964.

RELIEF REQUESTED

The Attorney General asks this court to grant relief in three respects as follows:

(a) the Attorney General seeks to obtain a right of transfer for any Negro in the eleven departments who was or may have been discriminatorily assigned prior to October 1, 1967. Such a Negro would be entitled to first priority to transfer to any vacancy in any of the other 68 departments with a guarantee that the pay he would receive in his new job would be at least equal to his average hourly earnings (including overtime and incentive) in his former job. If his new department did not have any job which paid so well, he would be paid at the rate of the top job in his new department. In addition, he would have superseniority, that is, he would be entitled to use his continuous Plant service, not unit seniority, to bid for vacancies in his new unit;

(b) the Attorney General seeks to suspend for five years the application of Appendix 10 of the currently effective Master Agreement which provides that craft apprenticeship vacancies shall be filled on the basis of relative seniority first from within the seniority unit, then from within the pool area including the seniority unit, then from within the Plant and lastly from among new hires. Instead, the Attorney General would require the company to consider Negro applicants from anywhere in the Plant or from off the street for apprenticeship vacancies; and

(c) the Attorney General seeks special relief with respect to the Coke Ovens Department, specifically to provide a right of transfer for any Negro, hired prior to October 1, 1967, and assigned to the Battery or Coal Handling units, to fill any vacancy in one of the other units with rate retention and superseniority.

In order to determine whether such relief is warranted, the facts surrounding the present transfer system must be considered. Consideration should also be given to the specific facts regarding the Coke Ovens Department and the Apprentice program.

THE SENIORITY STRUCTURE OF THE PLANT

There are 82 departments at the Plant, each of which has a special function in

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the production of steel products, maintenance of facilities or servicing of the production departments of the Plant. Of the 82 departments, eight have no bargaining-unit hourly paid employees. The 74 remaining departments, the "production" departments, vary to a large degree in size, number of seniority units, function, worker skill required, rate of pay and type of hazard encountered. Although the departments are geographically located close to one another, their functions interrelate only vertically. They are disparate as working entities and as to processes utilized and products produced. Except as otherwise specifically designated herein, the court's discussion will be confined to the 74 production departments.

For purposes of promotion, job assignment and pay, there are 81 seniority units, some of which coincide with the departmental organization of the Plant. In certain departments the operations performed are so diverse that more than one seniority unit has been established, as in the Coke Ovens Department which is made up of four quite different seniority units and a Labor Gang. Within the seniority units are functionally structured lines of progression along which a worker may progress, or in slack periods be required to regress, from job to job. There are 285 lines of progression in the Plant. The general establishment of seniority units and lines of progression preceded the formation of the union, operating as a matter of custom and usage between the company and the employees. When the union came on the scene, it accepted the existing structure. Every functionally integrated steel plant in the United States has a multiple-unit seniority system.

After the initial assignment of an employee by the company to a particular department, his further assignment, layoff and transfer rights are based on a system of seniority detailed herein. This seniority system is in use throughout the entire basic steel industry in the United States and is not peculiar to, and was not designed solely for, [illegible] Plant or even this company. It is, therefore, plain that any substantial court ordered revision or modification of the seniority system now in operation at this Plant would have significant implications for the entire basic steel industry.

The Master Agreement is negotiated between representatives of the International Union and representatives of the basic steel industry. It is applied and adapted in accordance with its terms by the company and the Locals to the practices, customs and usages at the Plant as at each of the other basic steel companies and plants throughout the country. Certain specific responsibilities are reserved in the Master Agreement to the Locals. The principles of the seniority system, as negotiated between the company and the International Union, apply to the various plants of the company, are embodied in the present Master Agreement entered into by them under date of August 1, 1968, and prior thereto in earlier Master Agreements.

The seniority system itself, as embodied in the Master Agreement and implementing agreements relating to the Plant, was not and is not designed or motivated by racial discrimination and does not result in racial discrimination and the government does not contend otherwise.

Article X, Section 8, of the April 1962, Master Agreement required the establishment of "agreed upon" or "pool" areas. Each pool was to embrace at least one major operating unit within which all employees' rights in respect of layoff and recall from the involved plant were to be determined in accordance with continuous plant service. The stated purpose for establishing pool areas was to provide greater overall protection from layoff for longer-service employees.

At the Plant 36 pool areas, each comprised of one or more of the [illegible] seniority units, were established by agreement between the union and the company. Jobs classified as "pool jobs" in any given pool area are avail[illegible]

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...any employee in a seniority unit in the particular pool area with two or more years of continuous Plant service who by reason of lack of seniority has been demoted within and laid off from his seniority unit because of lack of work. His layoff and recall rights in the pool are thereafter determined in accordance with continuous Plant service. The composition of the pool areas has been, since 1962, governed by Local Seniority Agreements implementing the Master Agreement. Appendices to the Local Seniority Agreements list the pool areas at the Plant and the "pool jobs" within each area, which are effective during the period of each such agreement. Under the agreements at the Plant, all of the jobs in job classes 1, 2 and 3 and jobs constituting two-thirds of the worker population in job class 4 are designated "pool jobs." Those lower-rated jobs were chosen because few of the skills developed by experience in the line of progression are necessary for their performance.

Jobs in the steel industry have been classified for pay purposes through industry-wide negotiations with the International Union. Pursuant to an order of the National War Labor Board dated November 24, 1944, the steel industry, International Union and management, undertook to classify each job in each plant and standardize the wages for each. The results of those efforts, as updated, are now embodied in a job Description and Classification Manual most recently published under date of January 1, 1963. Twelve specific criteria are applied to classify each job:

(1) Pre-Employment Training;

(2) Employment Training and Experience;

(3) Mental Skill;

(4) Manual Skill;

(5) Responsibility for Materials;

(6) Responsibility for Tools and Equipment;

(7) Responsibility for Operations;

(8) Responsibility for Safety of Others;

(9) Mental Effort;

(10) Physical Effort;

(11) Surroundings; and

(12) Hazards.

TRANSFER PROVISIONS

Prior to 1962, the agreements between the company and the union contained no provision giving employees the right to transfer from one department to another within the Plant. This was also true of most of the other plants in the steel industry. As a practical matter, therefore, Negroes assigned to the eleven departments had no way, prior to 1962, to escape those departments and enter other departments which might have offered better long-term financial opportunities. This was equally true, of course, for the whites who were assigned to the eleven departments, and for the whites who were assigned to the many other departments affording financial opportunities inferior to the eleven departments—they, too, had no way to escape from the department to which they were assigned. The union has sought to obtain transfer rights in the steel industry at least since 1954, but it was unable to win such rights in negotiations until 1962.

In 1962, the union and the eleven steel companies bargaining together as the Steel Companies' Coordinating Committee agreed to adopt an industry-wide provision which would enable employees to transfer from one department in a plant to another. These transfer rights were broadened and strengthened in the 1965 and 1968 agreements. One of the factors which prompted the union to seek transfer rights was its awareness that in many steel plants Negroes had been assigned predominantly only to certain departments, and that only through a transfer procedure could the effects of this assignment pattern be overcome.

Under the 1962 agreements, "agreed-upon areas" (sometimes called "pool areas") were to be established in each

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plant. A vacancy not filled from within a seniority unit would be made available to the most senior qualified employee working anywhere within the "agreed-upon area" who sought the vacancy. This provision entitled employees to transfer from one department to another within the "agreed-upon area." It did not, however, entitle employees to transfer to departments outside their "agreed-upon area."

The 1965 agreement broadened transfer rights so that they became plantwide. Under the 1965 agreement, a vacancy not filled from within a seniority unit would be made available to employees seeking transfer in accordance with the following system of priorities:

First, to the most senior qualified employee working within the "agreed-upon area" who sought the vacancy (under the Bethlehem agreement, this is known as a "Section 12(a)" transfer);

Second, if not filled from within the "agreed-upon area," to the most senior qualified employee working anywhere in the Plant who sought the vacancy (under the Bethlehem agreement, this is known as a "Section 12(b)" transfer).

Under the 1965 agreement, employees were entitled to bid for Section 12(a) transfers after they worked in the Plant for six months, and for Section 12(b) transfers after they had worked in the Plant for two years. The Steel Companies Coordinating Committee insisted upon the two-year requirement in the fear that new employees would seek repeated transfers before they grew accustomed to their initial assignments. Under both the 1962 and 1965 agreements, employees who transferred from one department to another received the pay of the job to which they transferred, and were governed by the following seniority rules:

(a) For purposes of layoff and recall, their plant-wide seniority governed.

(b) For purposes of promotion and demotion, their unit or departmental seniority (i. e., seniority beginning on the date the transfer was effec
ed.

This absence of rate retention and l
of seniority carryover for promotion a
demotion purposes is common to ev
functionally integrated plant in the st
industry.

During the three-year term of t
1965 agreement, there were a total
306 applications for transfer under S
tions 12(a) and (b) at the Lackawa
Plant, filed by 267 employees (some e
ployees applied for more than one tra
fer). Of this total, 47 applications w
filed by 43 Negro employees.

Many of those, white and Negro, w
applied for and accepted transfers
so despite the fact that they suffe
a short-term cut in pay (because th
new job paid less than the old) and
sacrificed substantial seniority for p
motion and demotion purposes on
count of the transfers. At least
transferees (21 whites and 4 Negro
suffered an immediate cut in pay
reason of the transfer. Sixty-two
the transferees (57 whites and 5 N
groes) had seven or more years of s
vice (some had as many as 19 or
years), yet they transferred and ente
the new department without senio
carryover for promotion and downg
ing purposes. This experience is
nificant, for it demonstrates that
absence of rate retention and senio
carryover is not a complete deter
to employees' transferring. Empl
are willing to take short-term pay
and to give up their former unit se
ity, when sufficiently attractive
term opportunities arise in other
partments.

Furthermore, it appears that the
porary economic set-back suffered
transferring employee would be of
short duration. Evidence was
duced concerning the largest depart
in the Plant, Department 670 (
Mill). This department has more
2000 jobs, and would be one of the
cipal recipients of transferees. In
department, employees entering
tober, 1967, and beginning to

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...seniority at that point *averaged* fifty cents per hour more than the pay of the entry level job during their first ten months. Since most of them started at the entry level job, this means that at the end of the ten month period they were enjoying earnings substantially greater than fifty cents per hour above the entry level job. During that ten month period, many of these new employees rose to high-paying positions. This specific example is corroborated by plant-wide statistics indicating that employees with less than two years service average nearly 75 cents per hour above the lowest rate in the Plant, and employees with two to five years of service average nearly $1.35 per hour above the lowest rate in the Plant. It is thus apparent that an employee who transferred without the special remedies sought by the government nevertheless would progress at a rapid rate to relatively high-paying jobs in his new department.

THE EFFECT THE PRESENT SYSTEM OF TRANSFER AND SENIORITY HAS ON PAST PRACTICES OF DISCRIMINATION AT THE BETHLEHEM PLANT

There are 36 pools at Bethlehem, Lackawanna. One entire union local, Local 2602, is composed of 22 departments which constitute separate pools. All of the apprenticeable crafts are located within those departments. All but one of those departments (Department 404) are almost entirely white as the result of the discriminatory assignment and apprenticeship policies followed by Bethlehem. Therefore, the "intra-pool" transfer provisions mentioned previously were meaningless as to those units.

Thus, the proliferation of pools discriminatorily reduces the freedom of movement of Negro employees because under the Master Agreement intra-pool transfers have priority over transfer ... persons into a different pool.[1]

Three of the major production depar... ments, Coke Ovens—512; Blast Furna... —520; and Steelmaking—530 (to whi... Negroes were historically discriminato... ily assigned regardless of their quali... cations) have included within each ... their respective pools the all-whi... Electrical and almost entirely all-whi... Mechanical Departments which suppo... those units. These predominantly Neg... units provide almost all of the pool jo... in each of the three pools and, therefo... provide job security to the white uni... without receiving any job security fro... the white units in return.

In one pool in which the major produ... tion unit is almost entirely white, t... Strip-Mill, Department 670, the all-whi... Electrical and Mechanical units whi... support it (and which would gain j... security at the expense of the Strip-Mi... are not in the same pool.

Under Article X, Section 6, of the 19... Agreement, an employee did not acqui... any seniority until the expiration of s... months, after which the length of h... continuous service was computed fro... the date of his original employmen... Consequently, a 12(a) transfer could ... had only after he had six months ... service in the Plant. The 1968 Agre... ment still requires six months of Pla... continuous service for eligibility ... transfer under Section 12(a). In e... fecting a transfer under 12(a), th... transferring employee had to give u... basically the same accrued rights d... scribed above in the discussion of 12(b... transfers.

In other words, an employee wh... chooses to exercise either of these trans... fer rights must forfeit all of the benefit... of seniority which he had accrued in hi... pre-transfer position, such as pay rate... promotion opportunities, protectio... against demotion, job selection, and ente...

[1] Art. X, Section 12(b) of the 1965 Master Agreement (G–8) required an employee to have two years plant continuous service ... he could transfer between pool areas. The 1968 Master Agreement (G–8, Art. X, Section 12(b)) reduced that period to one year.

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the new unit as a new man, generally going to the entry level job.

The court finds as fact that the transfer and seniority system negotiated in the 1962, 1965 and 1968 Master Agreements by the company and union, operates (as described above) in such a way as to tend to lock an employee into the department to which he has been assigned. This lock-in effect becomes stronger as an employee's length of service increases in a department. This means that the longer a Negro has worked in the hot and dirty department to which he was admittedly discriminatorily assigned, the more he has to lose by transfer.

DISCRIMINATION IN THE APPRENTICESHIP PROGRAM

Since 1946, Bethlehem has operated an apprenticeship training program to train employees in thirteen highly paid craft job areas. Until August 1, 1968, admission to the apprenticeship program was under the exclusive control of Bethlehem. From its inception in 1946 until September 1, 1967, a total of 567 craftsmen were graduated from this apprenticeship program, only six of whom were Negro. All of the Negroes were trained as bricklayers.

The Plant admittedly gave preferential consideration to white apprenticeship applicants, to the detriment of Negroes. Between July 2, 1965 and September 1, 1967, at least eleven Negro apprentice applicants were rejected on the basis of deficiencies in one or more of the announced qualifications for the program while during the same period at least 25 whites were accepted for training despite similar deficiencies.

A number of Negroes applying for the program were discriminated against in various other respects, and a total of at least 40 Negroes who qualified for the apprenticeship program have been discriminatorily rejected by the Plant since July 2, 1965.

As of September 6, 1968, there were a total of 126 apprentices in the Plant's apprenticeship training program. Of that number, which included ten Negroes, 33 had been hired directly "off the street" into the program rather than having been assigned to the program from other work areas at the Plant (Ex. G–26). Bethlehem admitted and the court found in its pre-trial order that the hiring and assignment practices in the apprenticeship program were racially discriminatory.

On the basis of this admission of discrimination, this court entered an agreed pre-trial order containing *inter alia* prospective relief provisions relating to the apprenticeship program. Under the order, Bethlehem is required to take certain enumerated steps to insure equal opportunity to Negroes in entering the apprenticeship program in the future. Since the union had not been involved with the apprenticeship program as it had existed theretofore, the union was specifically exempted from the relief provisions of the pre-trial order dealing with the apprenticeship program.

During a pre-trial conference, the court was advised by counsel for the government that on August 1, 1968, as a result of negotiations between Bethlehem and the union, selection to the apprenticeship program for the first time was removed from the exclusive control of the Plant by virtue of an agreement embodied in Appendix 10 of the 1968 contract to use the seniority system in filling apprenticeship openings. At the time of trial, union officials testified that this agreement means that the selection of apprentices will now be in the following order of priority:

1. From within the department in which the apprenticeship is located;
2. From among the Plant employees on a plant-wide basis; and
3. New employees from the outside.

Although the new system of selection has much to recommend it over the former arbitrary system of selection

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...inatory assignment to craft departments, the court finds that this system cannot be superimposed on the set of facts presently existing at the Lackawanna Plant. The inevitable effect of this agreement, because of the admitted racial composition of the departments in which the apprenticeable jobs are found, is and will be to give a preference to white persons in all of the apprenticeship crafts except one, *viz.*, Department 404 (Brickmason). This preference is a direct and necessary result of practices which this court has already found to be discriminatory and in violation of the 1964 Civil Rights Act. There is no justification for Bethlehem and the union to erect a new system which under these facts necessarily perpetuates a prior discriminatory situation. The new system of apprenticeship, since it is founded on a discriminatorily determined departmental situation, tends to extend and continue the past discrimination in violation of the Civil Rights Act of 1964 and should be altered.

On December 8, 1967, there were only 31 Negroes among the 1908 employees in the 12 departments, other than Department 404, to which apprentices are assigned. It is highly relevant to note that this situation is a direct result of discriminatory assignments carried out before and *after* the effective date of Title VII.

[1] Since the new system makes an employment opportunity (entry into the apprenticeship program) contingent upon a status which Negroes were unlawfully prevented from achieving, that is, employment in one of the twelve apprenticeable departments in question, that system is also discriminatory and violative of Section 707(a) of the 1964 Civil Rights Act (42 U.S.C. § 2000e-6(a)).

The union attempts to justify the use of the selection procedure under Appendix 10 on the basis of the fact that it is attempting to establish the same procedure in the steel industry as a whole. ... this, it argues that the application of Appendix 10 to the apprenticeship program was not selected to discriminate against Negroes.

However, whether or not application of the Appendix 10 selection procedure ... a nation-wide union goal, and whether or not it would produce substantial Negro participation under a fact situation existing at a different steel plant, ... immaterial and irrelevant to the instant situation, where company assignment practices prior to and following the effective date of Title VII resulted in exclusively or predominantly white departments from which apprenticeships under Appendix 10 would be filled on a priority basis. When the natural consequence of conduct in the given situation results in the denial of equal employment opportunities for Negroes, the purported reasons are immaterial and the natural consequences must be held to have been intended.

However, Department 404 (Brickmason) has not been the exclusive domain of white employees as have the other twelve departments with apprenticeable jobs. For example, Department 404 had 243 Negroes out of a total of 503 employees as of December 9, 1967. This large number of Negroes resulted from the Plant's practice until September 1967 of assigning Negroes to the laborer or helper jobs which are among the hotter and dirtier jobs in the Plant. Testimony at trial revealed that brickmason laborers spend most of their time in "holes and sewers." Since Negroes have not been excluded from Department 404, they have not been denied the status upon which eligibility for apprenticeship selection under Appendix 10 would depend. The government concedes that this is the case, and the court finds that Appendix 10 may be applied to Department 404 without violating Title VII.

COKE OVENS DEPARTMENT 512

The Coke Ovens Department is a production unit that produces coke for the rest of the steel plant to be used in making steel. The basic production unit within the Coke Ovens is the Battery

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Unit which consists of a series of ovens which reduce coal to coke. Because of the working conditions on the Batteries, the Coke Ovens Department was considered to be one of the hottest and dirtiest places in the Plant to work and for this reason, prior to September 1967, the Plant pursued a pattern or practice of assigning Negroes to the Coke Ovens Department regardless of their qualifications for other positions.

Department 512 has four separate seniority units. The Battery and Coal Handling Units, which have the lowest maximum pay rates in the department, job class 11, are 79% and 48% Negro, respectively; the By-Products and Heating Units, which have the highest top job grades in the department (job classes 15 and 18, respectively) are 15% and 26% Negro, respectively. One of the causes of the racial composition of these units was the racial discriminatory assignment of Negroes to the department. However, the prime cause of the disproportionate number of Negroes in the Battery and Coal Handling Units was the discriminatory assignment of Negroes by the Coke Ovens supervision, regardless of their qualifications to those units because those units contain the hottest and dirtiest jobs. To prevent Negroes from exercising their seniority rights to enter into the predominantly white units in Department 512, the Coke Ovens management and Local 2601 superimposed a unit seniority system over the Coke Ovens units and locked the Negro employees in the Battery and Coal Handling Units by enforcing a no transfer provision.

Prior to 1950, Coke Ovens management had complete control over assignments to the units within the Coke Ovens. Such assignments were made on the basis of race and Negroes were generally assigned to the Batteries and to a lesser degree to the Coal Handling Units, whereas whites were assigned to the Electrical, Mechanical, By-Products and Heating Units in the Coke Ovens.

In 1950, the first written Coke Ovens Department seniority agreement was negotiated by Bethlehem and Local 2601. This agreement established these units as separate seniority units in the Coke Ovens. Under this agreement, vacancies in the units were to be filled from the Coke Ovens labor gang on the basis of departmental seniority. However, the agreement did not provide that replacements could be obtained *only* from the labor gang. It was the mutual understanding between the Coke Ovens management and Local 2601 that replacements to fill vacancies in the units would also be obtained by allowing transfers from the various units in the Coke Ovens to fill the vacancies. This mutual understanding provided that the transferee would enter the entry-level position in the unit into which he desired to transfer and, consequently, he would lose his pay rate and enter the new unit at the entry-level job.

In 1952, new personnel moved into the top supervisory positions of the Coke Ovens. The new supervision imposed a prohibition against transfer between the seniority units in the Coke Ovens solely for the purpose of preventing Negroes from transferring into the white Coke Oven units.

[2] Local 2601 acquiesced in the prohibition against transfers. The newly elected president of Local 2601 in 1954 did not even become aware of the Coke Ovens seniority system until 1956. In 1956, Local 2601 filed a grievance requesting that the seniority system be altered so as to allow transfers, thus conceding that the seniority system prohibited transfers. Local 2601 withdrew this grievance before it was considered by the arbitrator, after reading Bethlehem's brief. The Coke Ovens Department membership of Local 2601 in 1962 and 1963 never voted to retain any prohibition against transfers. The vote on the issue of transfer was recorded in the grievance filed in 1956 which the Coke Ovens employees voted in favor of transfer.

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of the membership had voted to retain a no-transfer provision, Local 2601 would have still had the duty to negotiate a system that would alleviate the discriminatory assignment patterns.

In 1962, the company and union negotiated transfer rights which gave employees the right to transfer between seniority units into vacant positions. This right to transfer between seniority units was limited to seniority units which were encompassed within the same pool for lay-off and recall purposes.

In 1965 and 1968, the transfer rights between seniority units in the same pool areas were renegotiated and remained in effect. In spite of the 1950 seniority agreement pertaining to the Coke Ovens, Local 2601 interpreted the transfer of right provision in the 1962, 1965 and 1968 contracts to provide no transfer of right between the seniority units in the Coke Ovens Department, even though these units were in the same department and *a fortiori* in the same pool area. Local 2601 affirmatively enforced this interpretation and both before *and after* 1965, the effective date of Title VII, instructed its membership that there was no right to transfer and took no action to enforce Negro employees' right to transfer within the Coke Ovens when such rights were denied by the Coke Ovens Management. Bethlehem continued to prohibit transfers until August of 1968. However, Local 2601 continued to contend that the seniority system prohibited transfers until December of 1968 when the trial of this case was almost completed.

The prohibition against transfers instituted in 1952, was instituted for the purpose of discriminating against Negroes. Local 2601's acquiescence therein established that prohibition as part and parcel of the Coke Ovens seniority system. The Coke Ovens unit seniority system and prohibition against transfer had the purpose and effect of segregating Negroes within the Coke Ovens and denying them equal opportunity of employment in the Coke Ovens.

The Master Agreements provide that new employees have no seniority rights for the first 30 days of their employment. One of the methods of effecting the racial assignment to the different units in the Coke Ovens Department was to manipulate the Coke Ovens Department seniority system by assigning Negroes out of the labor gang after they had been in the labor gang anywhere from three days to two weeks and therefore had not yet accrued enough service to have any seniority rights, primarily to the Batteries Unit and also to the Coal Handling Unit. Company records indicate that Negro employees have complained about such practices since 1956. These Negro employees were told only that they were to work on the Batteries and were sometimes not told whether or not their assignments were permanent but were always informed that transfers between units were not allowed.

Although there is credible evidence on the record to indicate that in *some* instances Negroes preferred assignment to Batteries and Coal Handling because initial rates of pay are higher and employment tends to be steady in those units, a conclusion that this factor completely explains the present composition of the units and that their racial makeup at present is a result of non-discriminatory assignment of employees to the various units would be against the weight of evidence and would ignore the facts disclosed by the evidence.

While the company's Coke Ovens Department seniority records indicate that there have been no permanent assignments to the Batteries Unit since 1965, Negroes with Coke Ovens seniority dates since 1965 are working on the Batteries. While the company maintains that these people are really in the labor gang, the records of unit assignments maintained in the Coke Ovens indicate that several of these Negro employees, who have no record of any permanent assignment date to the Batteries, are recorded as filling

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the entry-level jobs in the Batteries Unit on a permanent basis. Seventy-three of these Negroes working on the Battery, hired since 1965, have more departmental seniority than do some white employees working in the By-Products and He... Units.

The seniority lists prepared for ea... unit in the Coke Ovens in December ... 1967 (Ex., G–52) reflect the following:

Unit	Total Employees	Total White	Total Negroes	Other Minorities
Battery	350	44	277	29
Coal Handling	79	30	39	10
By-Products	53	43	8	2
Heating	57	42	15	0
Labor Gang	18	5	12	1
	557	164	351	42

These figures indicate that of all the Negroes working in the Coke Ovens Department, 79% are working in the Battery Unit and 90% are working either in the Battery or in Coal Handling Units. At the same time, only 27% of the whites working in the Coke Ovens Department were working in the Battery Unit and only 45% of the whites were working in either the Battery or Coal Handling Units.

The seniority records of Negroes who worked in the Battery Unit from 1964 through 1965 and for whom dates of permanent assignment to that unit are indicated reflect that the average Negro working in that unit was permanently assigned to the Battery within 3.4 days after he was assigned to the Coke Ovens Department.

Complementing this racial assignment has been the practice of excluding Negroes from the By-Products laborer job both before and after July 2, 1965. Company records indicate that no Negroes presently working in the Coke Ovens Department had ever worked in the position of By-Products laborer. On the other hand, of the 53 employees working in the By-Products Unit, 22, all of them white, had entered the unit in the position of By-Products laborer. Negroes have been dissuaded from accepting the By-Products laborer job by being informed that they do not have the qualifications to operate the next By-Products job ab... the laborer job and therefore were i... that they could not progress above ... position of laborer in the By-Prod... Unit.

[3] The officers of Local 2601 h... long been aware of such practices. T... has been established by the fact t... various Negro stewards have complai... to the white officers of Local 2601 ab... such practices. The notice of such d... criminatory practices to Local ... placed upon the local the duty to t... whatever steps were lawful to alle... the discrimination and the effects of ... discrimination upon its Negro mem... ship. However, Local 2601 filed only ... grievance that might allege racial ... crimination until after the invest... tion of this case by the Department ... Justice.

Departments 417 and 427 are ... Mechanical and Electrical Units, re... tively, that prior to 1952 were units w... in the Coke Ovens Department. T... racial composition at that time ... white. In 1952 they were made sep... departments. Prior to their separa... from the Coke Ovens Department, ... Ovens employees were allowed to bi... those units from the Coke Ovens ... gang. After the separation of ... units from the Coke Ovens Depart... employees in the predominantly

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...partment could no longer ...d into those units.

From 1962 until 1962 there was no transfer of right provisions that would allow transfers between the Coke Ovens Department and the Electrical and Mechanical Departments. Because of the separation of these units from the Coke Ovens and because of the continuing racially discriminatory assignment of Negroes to the Coke Ovens and white employees to the Electrical and Mechanical Departments by Bethlehem, the Electrical and Mechanical Departments remained almost entirely white. While the 1962 and 1965 Master Agreements provided for a transfer of right between units in pool # 1, Bethlehem prevented Negroes from transferring into the Mechanical and Electrical Units by the discriminatory application of tests.

The 1962, 1965 and 1968 Master Agreements negotiated by the union and Bethlehem provided for the creation of pools for the stated purpose of extending layoff and recall protection to senior employees. The actual composition of the pools in terms of which departments were to be joined together to create such pools and which jobs in those departments were to be included in pools as "pool jobs" were left up to the local unions and Bethlehem. Bethlehem and Local 2601 agreed to place Department 417 (Mechanical), Department 427 (Electrical), and the Coke Ovens Department together to create pool # 1. In a layoff situation, senior employees in the departments within a pool can move out of their departments into other departments and occupy pool jobs. The Mechanical Unit had only two jobs that are classified low enough to be included as pool jobs. The Electrical Unit had no jobs that were low enough to be pool jobs. Therefore, virtually all of the pool jobs in pool # 1 were contributed by the Coke Ovens Department. As a result of this composition, employees in the all-white Electrical and Mechanical Units can bump Coke Oven Department employees out of pool level jobs in the Coke Ovens Department in a layoff situation. The reverse is not true. Therefore, the employees of the all-white Mechanical and Electrical Units were afforded substantially more layoff and recall protection than were the employees of the predominantly Negro Coke Ovens Department.

The steps taken independently or in concert by Bethlehem and Local 2601 from 1950 until 1968, as outlined above, have resulted in the denial to Negro employees of the Coke Ovens Department of employment opportunities equal to their white counterparts. These steps were an extension of the discriminatory practices admitted by Bethlehem and found as fact by this court. It is clear that they were undertaken with the intent to discriminate against Negroes. To the extent that the defendants have had to observe the results of these steps, their failure to take corrective action and the pervasive discrimination practiced by Bethlehem throughout the rest of the Plant give ample bases to infer such intent.

[4] All of these steps, independently and collectively, deprived and continue to deprive the Coke Ovens Negro employees of equal employment opportunities in violation of Title VII, 42 U.S.C. § 2000e et seq. Adequate relief for the Coke Ovens requires only that persons in the Coal Handling and Batteries Units, within the defined class as of the date of the court's order, should be offered the first opportunities to transfer to vacancies in the By-Products and Heating Units based upon their Coke Ovens Department seniority. These transferees would take the entry level job in those units if they should elect to transfer. The discrimination practiced in the past within the Coke Ovens Department requires that this relief be granted.

[5, 6] The findings of fact as outlined above have been reached by examining both the proof on trial and the stipulations filed with the court. Full consideration has been given to pre-Act conduct as revealed by the stipulations and the proof in spite of the protests of

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the defendant corporation. It seems to the court that consideration of pre-Act conduct serves to illuminate the purpose and effects of present policies, especially where policies which appear to be racially neutral are claimed to be part of a pattern or practice of racial discrimination. Moreover, where the Act is violated, racially neutral practices may be prohibited or changed because they build upon a foundation of pre-Act discrimination and tend to have present discriminatory effects. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970); United States v. Sheet Metal Workers Int. Ass'n, Local U. 36, 416 F.2d 123 (8th Cir. 1969), reversing, 280 F.Supp. 719 (E.D. Mo.1968); United States v. Local 189, United Papermakers and Paperworkers, 301 F.Supp. 906 (E.D.La.1969), aff'd 416 F.2d 980 (5th Cir. 1969); United States by Clark v. H. K. Porter Co., 296 F.Supp. 40 (N.D.Ala.1968); Dobbins v. Local 212 Int. Bro. of Elec. Wkrs., 292 F.Supp. 413 (S.D.Ohio 1968); Vogler v. McCarty, Inc., 294 F.Supp. 368 (E.D.La. 1968), aff'd sub nom., Local 53 of Intern. Ass'n of Heat and Frost Insulation and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va. 1968). Post-Act conduct cannot be properly evaluated in a vacuum. A full understanding of the nature and import of post-Act conduct may only be reached after considering the circumstances in which it takes place. Additionally, allegations that there is a "pattern or practice of discrimination" would be difficult to prove without reference to the practices of the past. In short, the prior acts of the defendants regarding employment practices are relevant and material in determining whether present practices are illegal or tend to perpetuate past discriminatory practices.

[7] The Attorney General in this case has presented considerable statistical evidence in support of the allegations contained in the complaint. For example, certain statistics concern the percentage of Negroes in departments or units of the Bethlehem Plant on specific dates, and in some cases the statistics show complete absence of Negroes in some departments of the plant. Statistical evidence is, of course, subject to various inferences, susceptible to many interpretations, and must always be viewed with caution and weighed with great care. Indeed, the disparate conclusions which have been urged on this court by the opposing parties, using the same statistical raw material, demonstrate the caution that must be used in drawing factual conclusions from statistics. But the difficulties inherent in the process should not render the use of such statistics improper. Probabilities guide men in their everyday affairs. Evidence of statistical probability may likewise be considered by a finder of fact in determining the questions presented. This was recognized by the Eighth Circuit Court of Appeals in United States v. Sheet Metal Workers Int. Ass'n, Local U. 36, *supra*, where the court stated: "The Act, in our view, permits the use of evidence of statistical probability to infer the existence of a pattern or practice of discrimination." 416 F.2d 123, 127 n. 7. This court is of the opinion that in some cases the statistics themselves might raise such a compelling inference in the absence of any contrary explanation as to make out a prima facie case of discriminatory patterns or practices. This case, however, is not one of them. The admissions contained in the stipulations considered together with the statistical evidence and the testimony at trial comprise such overwhelming proof of discrimination that it warrants some relief by decree of this court for, as stated by Circuit Judge Wisdom, "When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes on-going discrimination unless the incidents are limited to those that safety and efficiency require." Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 at 994 (5th Cir. 1969). The court there noted that the Civil Rights Act "operates only prospectively," 416 F.2d

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much emphasis on the prospective nature of the statute serves only to becloud the fact that seniority systems which perpetuate past discriminatory practices may be altered by decree when there has been a violation of the statute after its effective date. See, e. g., Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970); United States v. Sheet Metal Workers, *supra* (8th Cir. 1969); United States v. Local 189, *supra* (5th Cir. 1969); Local 53 v. Vogler (5th Cir. 1969); see also Quarles v. Philip Morris, Inc., *supra*.

[8–10] Here, the discriminatory practices were admitted and continued for over two years beyond the effective date of the Act. Under such circumstances, a court may alter by decree a seniority system which itself may be racially neutral on its face, even though the system developed without regard to racial considerations. Local 189 v. United States, *supra*. This is true irrespective of section 703(h) of Title VII, 42 U.S.C. § 2000e–2(h) which exempts as unlawful employment practice different conditions of employment pursuant to a bona fide seniority system which is "not the result of an intention to discriminate because of race." Intention may be inferred from conduct considering all the surrounding circumstances. It is not necessary to prove that an intention *to discriminate* existed at the time of the conduct. To prove intention all that need be demonstrated is that the conduct is not accidental, inadvertent or heedless, or arises from mistake. Local 189, United Papermakers & Paperworkers v. United States, *supra*, 416 F.2d at 995 n. 15, cf. Dobbins v. Local 212, *supra*, and United States by Clark v. H. K. Porter Co., 296 F.Supp. 40 at 115 (N.D.Ala.1968). Also "bona fide" as used in the statute should not be read as exempting from adjustment a seniority system based on discriminatory practices where the proof shows a violation of the Act after its effective date and the seniority system perpetuates the effects of the discrimination. Such a syste is not bona fide. Local 189 v. Unite States, *supra*, 416 F.2d at 988; Quarl v. Philip Morris, Inc., *supra*, 279 F.Sup at 517. Here, the record is replete wit facts from which the intention of th company can be inferred. The condu of the union, including its failure to tak steps to discourage company policy an its acquiescence in an historical and tr ditional discriminatory policy, belies th contention that its participation in th end result was accidental, inadvertent o unintentional. This court cannot believ that the union was unaware of a situa tion which was perfectly obvious to ever Negro at the Bethlehem Plant.

[11] Given this factual situation, is clear that this court is fully empowe ed both by the statute itself (sectio 707(a), 42 U.S.C. § 2000e–6(a) whic authorizes the Attorney General to r quest "such relief * * * as * * necessary to insure the full enjoyment o the rights herein described") and b traditional principles of equity, cf. Mitch ell v. DeMario Jewelry, 361 U.S. 288 291–292, 80 S.Ct. 332; 4 L.Ed.2d 32 (1960) and Porter v. Warner Co., 32 U.S. 395 at 398, 66 S.Ct. 1086, 90 L.E 1332 (1956); see also United States b Clark v. H. K. Porter, *supra*, 296 F.Sup at 115, to fashion a decree which wi correct the present effects of past di crimination. Indeed, as stated by th Fourth Circuit, "In formulating relie from such practices the courts are n limited to simply parroting the Act's pr hibitions but are permitted, if not r quired to 'order such affirmative actio as may be appropriate.'" 407 F.2d 10 at 1052; 42 U.S.C. § 2000e–5(g). Hov ever, in granting relief, the court mu also anticipate collateral effects of a pr posed decree to determine if such effec would create inequities so as to re der the proposed relief inappropriate u der the particular facts of the case. Th court must now consider the relief r quested by the Attorney General to d termine if such relief should be grante under all the facts and circumstance

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COLLATERAL EFFECTS OF REQUESTED RELIEF

[12] The Attorney General asks this court to remedy the discriminatory assignment policy of Bethlehem Steel Corporation's Lackawanna Plant by allowing all Negroes (and only Negroes) employed in the eleven departments to transfer from those departments to other departments in the Plant with rate retention and without the loss of seniority privileges. While it may be true that this remedy would completely erase any vestige of past discrimination, the court is of the opinion that the remedy would be too drastic, would result in considerable inequities to the other plant employees, and would create an unwarranted preference for Negroes over whites in the eleven departments. While the proposal would certainly make transfer more attractive to employees than presently, the court believes that, among other things, the following inequities would result:

(1) The remedy benefits certain Negroes but not whites who are similarly situated. Although this court does not doubt its power in a proper case to provide a remedy exclusively for Negroes where they are the only members of the class discriminated against, the proof in this case indicates that Bethlehem Steel Company's discriminatory assignment policies related not alone to Negroes but also to ethnic minorities in general (Stip. 2, p. 3; Trial Transcript pp. 1144–1153, 1356, 1372–3 and 1585). Simply because the Attorney General has, for practical reasons, limited its case to Negroes, does not require the court to be so limited in providing relief. Indeed, to do so under these facts would be arbitrary, unfair and unwarranted under the evidence presented.

(2) Rate retention would result in different rates of pay for doing the same job. It would undermine the Job Classification Program in the industry and create broad exceptions to the "equal pay for equal work" doctrine which is the hallmark of the steel industry in this country. It is not improbable that em-

ployees receiving less than [illegible] the same work would demand that th[eir] rate be upgraded similarly. Rate retention would also result in some instances in the transferees receiving higher pay than the supervisors for whom they work, with the attendant adverse effect on morale and production. Additionally, where incentive jobs are involved, the transferee, since he may already receive a higher rate of pay, would have little or no motivation to increase production. Where the incentive is computed on a group basis, the group would suffer from the lack of motivation of its transferee members resulting in damage to morale throughout the Plant. Finally, under the proposal, there is no provision which would prevent senior employees in the eleven departments, who now hold highly-paid jobs of responsibility, from transferring to less responsible positions in other departments while receiving the same rate of pay. Considering all the evidence, the court believes that any decree containing rate retention provisions, under the circumstances of this case, would result in inequities at least as objectionable as those the court is attempting to correct.

(3) The government's proposed seniority carryover remedy would seriously disrupt employees' existing promotional and demotional aspects by changing the relative seniority standings of employees and enabling transferees to displace existing employees from their jobs. Thus, employees who are blameless would pay the price for the company's violations. The government acknowledges that its seniority carryover remedy would have these effects.

Throughout the history of the steel industry, employees have advanced through their seniority units on the basis of their relative seniority within the department or unit. As promotional opportunities arise, the qualified employee with the greatest departmental or unit seniority is the one who is entitled to the promotion. Employees who transfer from another department begin accumulating departmental and unit seniority from the time they enter the [illegible]

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ment; their seniority accumulated in their former department does not count in determining their relative standing for promotional purposes. The same is true when a reduction in force occurs.

The departmental and unit seniority system developed out of a desire that employees at all times know where they stand in terms of their future prospects in the department in which they work, and to enable employees to make decisions relating to their future with knowledge of their relative standing. The government's proposed carryover remedy would alter the relative standings of employees in their units in the following ways:

(a) Although under the government's proposal employees would initially go to vacant jobs at the bottom of the seniority unit and their entry into the department would not be at the expense of employees already in that unit, once in the new unit, the transferee would be credited for all subsequent moves with his full plant-wide service. The effect of this process would be to disrupt what would have previously been the firm expectation of employees already in the unit who had less plant-wide seniority than those transferred into the department. The same disruption would occur in reverse during a reduction in force.

(b) Many employees, both white and Negro, have transferred without the seniority carryover and if the government's proposed remedy were utilized, these transferees would occupy a seniority status inferior to those who transfer under the court's decree.

(c) The government's remedy would be made available to a limited group of people at the expense of others who are equally or worse situated, including the whites in eleven departments and the whites and Negroes in departments inferior to the eleven departments.

(d) Much credible evidence was introduced during the trial which indicated that the Negro employees of Bethlehem Steel Corporation, Lackawanna Plant, do desire a special set of rights but

progress like everyone else in the Pla
As mentioned previously, the proof a
indicates that transferring will t
place without special incentives.

For all of the foregoing reasons, t
court concludes that the seniority car
over remedy sought by the governm
in this case would be arbitrary in
application and effect, inequitable
employees guilty of no wrong, and wo
have adverse effects wholly out of p
portion to the injustice which it seeks
cure.

REMEDY

Consideration of all of the above c
lateral effects convinces this court th
the relief proposed by the governm
contains provisions inappropriate and
equitable in curing a system which ten
to lock Negroes and others into depa
ments to which they were discrimin
torily assigned. Moreover, the court
lieves that any relief designed to cu
the present effects of discriminatory
signment must apply to all employees
the eleven departments irrespective
race, since the proof indicates that t
discrimination was practiced again
ethnic minorities in general. As of O
tober 21, 1967, the proof indicates (Go
Ex. 3) that there were 6227 employe
in the eleven departments, 2160 of who
were Negroes. This court has found th
transfers occur even when unaccor
panied by the collateral benefits of ra
retention and seniority carryover deem
necessary by the Attorney Gener
Transfer rights in order of Plant se
iority, available to all employees in t
eleven departments, without those ben
fits, will allow employees, who are tod
offended by the present effects of th
discriminatory practices, the opportuni
to avoid those effects. Because in e
ercising the option to transfer they wi
incidentally suffer temporary economi
loss and must sacrifice accrued seniori
in their present job, does not make th
remedy ineffective. The choice will b
long to the employees irrespective o
race. If an individual deems it mor
advisable for him to stay where he
rather than suffer economic and senio

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that he has not had a chance to change departments and avoid the present effect of the discriminatory practice. The things he will have to surrender have accrued to him without regard to race. All employees who elect to transfer will transfer under the same conditions without regard to race. The free choice is their own.

[13] The court will order that all employees, both Negroes and whites, in the eleven departments as of October 1, 1967, shall have the right to transfer to other departments on the basis of seniority without rate retention or seniority carryover. As detailed above, the court also will order the relief requested regarding the Coke Ovens Department 512 and apprentice program and believes such relief is appropriate to cure the present effects of past discrimination. In addition to strengthening the transfer rights already in existence in the plant, the court will order that the company and union effectuate a substantial reduction in the number of pools, a remedy which will offer dramatic prospects of broadening transfer opportunities. The court believes that these steps will prove adequate to alleviate the present impact of the company's past policy of discriminatory assignments.

Enter decree accordingly.

United States v. McKinney Steel Corp.
Amended Decree—(W.D.N.Y. Oct. 16, 1971)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General,

Plaintiff,

-against-

BETHLEHEM STEEL CORPORATION, a corporation, et al.,

Defendants.

CIVIL 1967-432

AMENDED DECREE

This action having been remanded to this Court by order and judgment of the United States Court of Appeals for the Second Circuit, dated June 21, 1971, for entry of a new decree in accordance with the opinion of that Court dated June 21, 1971, as amended by order of that Court dated August 27, 1971, and the mandate of the Court of Appeals having been filed in the Office of the Clerk of this Court on September 14, 1971,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That paragraphs 5(a) and 7 of the decree entered herein by this Court on April 13, 1970, is hereby amended to read as follows:

5. Bethlehem Steel shall adopt and implement the following program to correct the effects of its past racially discriminatory practices in hiring, assignment, transfer and promotion of Negro employees.

(a) (1) A list shall be prepared of Negro employees who, before October 1, 1967, were hired and initially assigned to the departments set out in paragraph 1 of this decree. This list shall include the date of employment, the department of original assignment, and the department of current assignment if different from the department of original assignment. By October 26, 1971, each such employee who has not previously transferred out of one of the eleven departments shall be offered in writing the opportunity to transfer and shall have made available to him during the next ninety (90) days, by Bethlehem, all necessary forms, explanations of procedures to be followed in effectuating such a transfer, the nature of information available and where it may be obtained. Bethlehem shall compile information concerning the departments other than those listed in paragraph 1, including average earnings in the job classifications, seniority lists and other available information pertaining to promotional opportunities and job security and shall keep such information readily available in the employment office for inspection by members of the affected class. In addition, the parties to this lawsuit shall designate representatives to form a Seniority and Transfer Information Committee, which will be available at designated times to advise members of the affected class as to their rights and opportunities hereunder.

(2) Any employee seeking such a transfer must submit his request in writing within ninety (90) days after the offer. Each such employee will be given the opportunity to designate, on the forms provided by Bethlehem, the department or departments to which he wishes to transfer, provided none of such departments is among those listed in paragraph 1 of this decree. Employees requesting such transfers shall be transferred in accordance with their plant service dates to the first available permanent vacancy in any department they have designated, provided the transferring employee meets the qualifications or prerequisites for assignment required in that department. For the purpose of the preceding sentence an "available permanent vacancy" is a permanent vacancy which is not filled in accordance with normal seniority practices. If a vacancy occurs which proves to be a permanent vacancy, but was filled on a temporary vacancy basis, the employee entitled to transfer to said permanent vacancy pursuant to paragraph 5(a) of this decree shall be transferred to fill that vacancy. An employee who shall have requested a transfer may reject a transfer made available to him

to a department he has designated, but if he shall reject two such opportunities for transfer he shall not thereafter be entitled to the rights granted by paragraph 5(a) of this decree. In no case shall the qualifications or prerequisites for assignment, including testing, applied to the transferee be different or higher than those required of the least qualified person assigned to that department since January 1, 1964, nor shall any new hire or transferee under the provisions of the collective bargaining agreement be assigned to any department for which an application under this provision is pending unless no applicant is qualified for the vacancy to be filled or all of the applicants reject a transfer to such vacancy.

(3) In the event that two years after the date of this amended decree, Bethlehem has been unable to transfer an applicant to a department designated by him, he shall be given notice that he has an opportunity within thirty (30) days of his receipt of the notice to again designate a department or departments to which he wishes to transfer, under the terms and conditions of paragraph 5(a) of this decree, and unless he again designates a department or departments to which he wishes to transfer he shall not thereafter be entitled to the rights granted by paragraph 5(a) of this decree.

(4) To determine who is eligible for promotion, and for the purpose of demotions, or layoffs in connection with the decreasing of the working force and of the recalling to work of men so laid off, in accordance with the provisions of Article X, Section 1, of the 1968 Master Agreement or the corresponding provisions of a subsequent agreement, when an employee who has transferred pursuant to this decree is competing for a job, the continuous service to be used for all competing employees will be plant service date and no other, except that when workers in the transferee's unit in his new department are recalled after any layoff from the unit all employees shall return to the same positions relative to each other as they held immediately prior to their layoff, or, in the event of changes caused by promotion or attrition, to the positions which they would have had if there had been no layoff.

(5) Only workers qualified to fill a higher job may use plant service to advance. Except for the purpose of filling a lower-rated position at a time of force reduction or layoff in a unit, there will be no bumping of employees out of other jobs. Except as may be provided by a line of progression there will be no right to leapfrog over employees in intermediate jobs and compete for a higher job on the basis of plant service.

(6) Each employee transferring pursuant to this decree shall, for each pay period, be paid (i) at the rate equal to the standard hourly wage rate nearest to his average hourly earnings in the department from which he transferred, exclusive of incentive pay, shift differentials and Sunday and overtime premiums, for the 13 weeks or 7 bi-weekly pay periods prior to his date of transfer (his red-circle rate), plus the incentive pay (calculated at the incentive calculation rate for his red-circle rate), shift differentials and Sunday and overtime premiums earned on his new job, or (ii) his average hourly earnings at the established rate for his new job, including the incentive pay, shift differentials and Sunday and overtime premiums earned on such new job, whichever is higher. If there shall be a general wage increase within nine (9) months after his date of transfer, his red-circle rate shall be increased by the amount of the general wage increase. When a transferee's average hourly earnings exclusive of incentive pay, shift differentials and Sunday and overtime premiums in his new department over a 13-week period or 7 bi-weekly pay periods equal or exceed his red-circle rate as defined above, his red-circle rate shall cease and he shall thereafter be paid at the rate of the job he is working. In no event shall a red-circle rate exceed the standard hourly wage rate for job class 11 at the date of this decree. If no job in a transferee's new department has a standard hourly wage rate as high as the transferee's red-circle rate as above defined, then his red-circle rate shall be the standard hourly wage rate of the highest job in his new department. A transferee who, after having been in his new department for thirty (30) days, fails to take an opportunity for, or refuses, a promotion or who fails twice to qualify for promotion to an available higher job, shall lose the rate retention rights granted in this paragraph and shall thereafter be paid at the rate of the job he is working. For the purposes of the preceding sentence, (1) a transferee who fails to take an opportunity for promotion within thirty (30) days of his last preceding promotion shall not lose thereby his rate retention rights granted by this paragraph; and (2) two or more failures to qualify within one thirty (30) day period shall count as only one failure. An employee who within one year following a transfer twice fails to qualify for promotion and thereby loses his rate retention rights as granted in this paragraph shall have the option, within thirty (30) days thereafter, to return to his former department without loss of seniority. Pending transfer under this decree, the appli-

cant for transfer shall lose no rights or privileges in his current department.

(7) In the event that any person transferred under the provisions of this decree shall be unable, within thirty (30) days after transfer to perform the duties of the new employment to which he is transferred, or requests to be returned to his former department, and returns to his former department under the provisions of the existing union contract, he shall be allowed to do so and to transfer under the provisions of this decree to one additional department with the seniority and rate retention rights provided for herein. Except as specifically provided in the preceding sentence, a transferee's right to transfer with the seniority and rate retention rights provided for herein may be exercised only once. The reasons for any return to his former department shall be documented in writing and retained on file by Bethlehem.

(8) Those Negro employees hired initially into one of the eleven departments set out in paragraph 1 of this decree prior to October 1, 1967, who have previously transferred to a department other than one of those eleven departments or to a unit of the Coke Ovens Department, 512, other than Batteries or Coal Handling pursuant to the right of transfer provided by Article X, Sections 8(g) and 8(h) of the 1962 Master Agreement or Article X, Sections 12(a) or 12(b) of the 1965 or 1968 Master Agreements and who are now in such new departments or in such seniority units will be accorded the same relief in their present department, or in their present unit in the Coke Ovens Department, with respect to rate retention and seniority, as will employees who may elect to transfer pursuant to this decree.

(9) Those Negro employees in the above defined class who are employed in the Batteries and Coal Handling Units of Coke Ovens Department, 512, shall have the additional option of electing to transfer under the above provisions of this decree from one of those two units in which he is working to the By-Product or Heating Unit of that department. Any employee who was employed as a bricklayer laborer in Department 404 and who has transferred to the bricklayer unit of Department 404 since January 1, 1968 shall be accorded the same relief with respect to rate retention and seniority in his present unit as employees who may elect to transfer pursuant to this decree. Such persons who are on layoff at the time of the entry of this decree shall be entitled to be recalled as force increases require on the basis of their plant seniority. Those Negro employees in the above defined class who are still employed as bricklayer laborers in Department 404 shall, when qualified, have the additional option of electing to transfer under the above provisions of this decree to the bricklayer unit of Department 404. With these exceptions, no special provision for transfer of members of the defined class is made for transfer within, between, or into the eleven departments named above.

(10) Each Negro employee who exercised the right of transfer pursuant to paragraph 5(a) of the decree as entered by the district court on April 13, 1970, and who is in his new department or in a new unit in the Coke Ovens Department, 512, as of the date of this decree shall be entitled in his new department or new unit in the Coke Ovens Department to the use of plant seniority for all purposes described in subparagraph (4) of this paragraph 5(a), and he shall, for each pay period, be paid (i) at a rate equal to the current standard hourly wage rate paid the job class nearest to his average hourly earnings, exclusive of incentive pay, shift differentials and Sunday and overtime premiums, for the 13 weeks or 7 bi-weekly pay periods prior to his date of transfer (his red-circle rate), plus the incentive pay (calculated at the incentive calculation rate for his red-circle rate), shift differentials and Sunday and overtime premiums earned on his new job, or (ii) his average hourly earnings at the established rate for his new job including the incentive pay, shift differentials and Sunday and overtime premiums earned on such new job, whichever is higher. His right to retain his red-circle rate as above defined shall be subject to the same terms and conditions described above with respect to employees transferring pursuant to this decree.

(11) Those white employees who exercised the right to transfer pursuant to the decree entered by this Court on April 13, 1970, shall retain the rights therein decreed. They shall not, however, be entitled to any additional benefits provided by this amended decree.

7. Each Negro applicant for the apprenticeship program within the period January 1, 1964, October 1, 1967, who had not as of April 13, 1970, been hired as an apprentice but who met the standards actually applied to the least qualified white applicant who was accepted during that period and who responded affirmatively to the offer made to him by Bethlehem pursuant to the decree of April 13, 1970, shall be offered apprentice opportunities in the order of the original application date—earliest date first.

2. That paragraph 13 of said decree is hereby amended to delete the second and third sub-paragraphs thereof and substitute the following paragraph 13A.

13A. By October 26, 1971, Bethlehem shall furnish to the plaintiff a list of all employees of the affected class showing each employee's plant service date and present departmental assignment separately for those members of the affected class who presently are assigned to one of the seven departments enumerated in paragraph 1 and for those who were initially assigned to one of such departments but who have since transferred to other departments. Bethlehem shall thereafter furnish the following information to the plaintiff:

(a) Within 30 days of October 26, 1971, a report showing the red-circle rate and average standard hourly wage rate at which he worked for the week ending October 30, 1971, or last layoff during that week for the last full week worked, for each member of the affected class who is presently assigned to a department other than one of the departments enumerated in paragraph 1;

(b) Within 100 days of October 26, a report for each department for which an application or applications for transfer has been made under this decree listing, in order of plant service date, the members of the affected class who made application for transfer to it showing the present departmental assignment of each;

(c) Within 15 days of the end of each calendar quarter beginning with the fourth quarter of 1971, a report showing (1) all members of the affected class who were offered transfer during the preceding quarter, indicating the disposition made of each such offer, (2) the red-circle rate and the average standard hourly wage rate at which he worked during the preceding quarter of each member of the class who during any part of the preceding quarter was paid on a red-circle rate basis; and (3) any change during the preceding quarter in red-circle status, with the reason therefor, of each such member of the affected class;

(d) A copy of the notice given each transferee upon his transfer under this decree which explains his rights under the decree;

(e) Within 10 days after any member of the affected class loses his red-circle rate for a reason other than the fact that the average standard hourly wage rate at which he works in his new job has exceeded his red-circle rate for a thirteen-week period, a report giving the name of the person affected and the reason for the loss of his red-circle rate;

(f) A copy of any letter sent to a member of the affected class who has lost his red-circle rate because he twice failed to qualify for promotion within one year of his transfer, notifying him that he may return to the department from which he transferred without loss of seniority;

(g) Within 10 days after any transferee returns to his former department, having worked in his new department 30 days or fewer, a report giving the name of such person and the reason for his return to his former department;

(h) A list of all persons who have been offered apprenticeships and placed in the apprenticeship program pursuant to paragraph 7;

(i) By November 22, 1971, a report showing the total initial hires, by race, for each department for the period October 1, 1967—September 27, 1971, and the total number of employees by race for each department as of September 27, 1971, and quarterly thereafter commencing with the fourth quarter of 1971 a report showing all initial hires and terminations, by race for each department during the preceding quarter and the total number of employees, by race for each department as of the Monday nearest to the last day of the preceding quarter;

(j) By October 26, 1973, a list of all members of the affected class who made application for transfer under the provisions of the decree but who have not then been transferred.

3. That in all other respects the decree entered herein by this Court on April 13, 1971 remain in full force and effect.

Dated: October 14, 1971

JOHN O. HENDERSON
United States District Judge

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C-4

United States v. Bethlehem Steel Corp.

Decree—(W.D.N.Y. Apr. 13, 1970)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General,

Plaintiff

-vs-

CIVIL 1967-432

BETHLEHEM STEEL CORPORATION, a corporation, et al.,

DECREE

Defendants

This matter having been tried before this court, and the parties having filed extensive stipulations of fact, which have been found as facts by the court, and extensive briefs having been filed by all parties, and upon full consideration of the facts, and the law, the court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

That the defendant Bethlehem and defendants United Steel Workers and affiliated locals, their agents, officers, employees, and all persons acting in concert or participation with them, be and they hereby are permanently enjoined from engaging in any act or practice at defendant Bethlehem's Lackawanna plant for the purpose or with the effect of discriminating against any individual because of his race or color.

That the defendant Bethlehem in concert with the defendant unions take the following steps at its

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Lackawanna plant:

1. Bethlehem Steel shall hire applicants for permanent or temporary employment and shall recall, assign, transfer and promote employees without discrimination on the basis of race or color. Bethlehem shall not follow a practice of assigning Negro applicants for plant employment on account of their race, to departments 404 (Brickmason Labor), 406 (Yard), 503 (Sintering Plant), 512 (Coke Ovens), 520 (Blast Furnaces), 530 (Steelmaking), 612 (44"-32" Mills), 620 (Billet Yard), 631 (12"-10"-8" Bar Mills), 660 (28" Mill) and 662 (14" Mill).

2. Bethlehem Steel shall implement an employment procedure which will insure that all applicants and employees are processed, hired, recalled, assigned, transferred, or refused employment, without discrimination on the basis of race or color. Employment procedures shall include at least the following provisions:

(a) Each applicant for employment shall be afforded the opportunity to fill out an application blank. He shall then be considered for any available job open to new hires.

(b) Each applicant for employment shall be informed at the time of his application for employment of all

available job openings for new hires and the full procedure for applying for all such job openings.

(c) Any employment test used as a screening device for plant employment and the electrical and mechanical tests shall be used only after full validation by an expert in testing who shall be appointed, compensated, and retained by Bethlehem Steel for the purpose of validating such tests, against the requirements for performance of the various jobs available and the multiracial character of the potential employee source. Pending such study, the currently-utilized Differential Aptitude Test and the electrical and mechanical tests may be continued in use, subject to the provisions of this decree, provided such study is to be completed within 90 days of the date of this decree. The maximum passing score during this period shall not exceed 70 for the Differential Aptitude Test, 65 for the mechanical test and 200 for the electrical test.

The plaintiff shall have the right to review and copy all materials used in the validation studies and shall be furnished a copy of the report of the validation studies and thereafter may apply to this court for further relief if necessary.

(d) No new employee shall be rejected or refused by any supervisor in the department for which he has been hired by the employment office. New employees may be returned to the employment office only if their on-the-job performance is judged inadequate and the reasons for such return documented in writing and retained on file in the employment office.

3. Bethlehem Steel shall give no unlawful preference to any applicants for employment or employees on the basis of relationship to persons presently employed, either as to employment, recall, assignment, transfer, or promotion.

4. Bethlehem Steel shall implement a program of recruitment designed to afford equal opportunity for employment. Whenever the plant is hiring, notice of Bethlehem's equal employment opportunity shall be

advertised, in the local media, in a manner calculated to reach Negroes, at least once each month for one year from the date of this decree. Regular contacts shall be maintained with Negro recruitment sources including, but not limited to, schools which have a substantial number of Negro students and organizations which are involved in Negro job placement. On a regular basis, at least once per month, such organizations shall be advised of available job openings. Consideration should be given to placing an employment office in the major Negro population area.

5. Bethlehem Steel shall adopt and implement a program to correct the effects of its past racially discriminatory practices in hiring, assignment, transfer and promotion of employees. This program, which shall be submitted in writing to the court and the plaintiff within ten (10) days, shall include at least the following:

(a) A list shall be prepared of employees in the departments set out in paragraph 1 of this decree who were hired before October 1, 1967. This list shall include the date of employment, the department of assignment, and the job classification in which the employee

is presently serving. Within thirty (30) days of this decree, each such employee shall be offered in writing the opportunity to transfer and shall be supplied by Bethlehem with all necessary forms and explanations of procedures to be followed in effectuating such a transfer. Any employee seeking such a transfer must submit his request in writing within sixty (60) days after the offer. Each employee will be given the choice of transferring to one of the following job areas: (a) electrical; (b) mechanical; (c) mill; and (d) other (except the eleven departments set out above). Any employee electing to exercise this option to transfer shall be transferred to the first available job in any of the departments in the area of his choice, provided that a vacancy exists pursuant to normal seniority practices in that department and the employee meets the qualifications or prerequisites for assignment required in that department. In no case shall the qualifications or prerequisites for assignment, including

testing, applied to the transferee be different or higher than those required of the least qualified person assigned to that department since January 1, 1964, nor shall any new hire or transferee under the provisions of the collective bargaining agreement be assigned to any department for which an application under this provision is pending. In the event that Bethlehem is unable, within two years of the date of this decree, to transfer any applicant to the area of his choice, he shall be given the opportunity to request a new area, under the same terms and conditions.

Employees requesting transfer pursuant to this paragraph shall be transferred in accordance with their plant seniority, except that those employees of this class who have previously applied for Mechanical or Electrical Division jobs shall upon application be given first priority in transferring to those areas in accord with their date of application to those divisions.

Each employee transferring shall be

paid at the current rate of the job into which he transfers. Pending transfer, the employee shall lose no rights or privileges in his current department.

In the event that any person transferred under the provisions of this decree shall be unable, within thirty (30) days after transfer to perform the duties of the new employment to which he is transferred and returns to his former department under the provisions of the existing union contract, the reasons for any such return shall be documented in writing and retained on file by the employment office.

Those employees in the above defined class,who are employed in the Batteries and Coal Handling Units of Coke Ovens, Department 512, shall have the additional option of electing to transfer under the above provisions of this decree, subject to the same conditions, between either of the two units named and the By-Product and Heating Units of that department. With this exception, no special provision for transfer of members of the

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defined class is made for transfer between and among the eleven departments named above.

(b) Bethlehem Steel shall, within sixty (60) days of the date of this decree, determine the potential for assignment to supervisory positions of (1) all non-supervisory employees in each department who have been employed for at least five years and (2) of each non-supervisory employee whose department length of service is equal to or greater than that of any hourly-paid employee who has worked as a supervisor 50 percent or more of his time in that department during the last year. Thereafter, lists of all such employees, identified by department, who have supervisory potential shall be prepared reflecting an order of precedence for promotion of such employees to supervisory positions and all promotions to available first line supervisory positions shall be made from such lists except that Bethlehem Steel shall, in Department 404, offer to Samuel Briggs, Charles Kerr, Fulton Taylor,

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and John Maglic and, in Department 512, offer to Samuel R. Hemphill, the opportunity for reinstatement in the supervisory positions from which they were demoted in 1967. No person shall be promoted to supervisory positions in Department 404 (Labor) before each of the above four men has been reinstated or has refused an offer of reinstatement. Within six months of the date of this decree, the plant will establish qualifications for and responsibilities of each supervisory position through the level of general foreman or equivalent and shall report to the plaintiff in writing the criteria established. The qualifications of each salaried supervisor selected during the three years preceding the date of this decree and of each non-supervisory employee previously listed as having supervisory potential pursuant to this paragraph shall be compared to the criteria thus established and such comparisons shall be reported to the plaintiff in writing. Promptly thereafter, and semi-annually for a

period of five years, the lists shall be reviewed and revised in accordance with such qualifications, and all promotions available to first line supervisory positions shall be made from such lists. In applying the provisions of this paragraph, the plant shall not be precluded from assigning on a nonracial basis to such supervisory positions employees employed in management training programs (e.g., the Loop Course and the Technical Trainee Program).

(c) All non-supervisory production and maintenance job openings not filled by established seniority processes shall be posted regularly in a place or places accessible to all present employees.

6. Bethlehem Steel shall within ten (10) days notify in writing and by conspicuous postings in the plant, all non-craft employees of the standards for admission to the apprenticeship program, the apprenticeships for which programs exist, and the time required to complete each program. Such employees shall be notified of all subsequent changes in admission requirements or in the number of apprenticeship programs offered. No requirements other than those announced shall be applied

for the purpose of selecting apprentices. All openings in the apprenticeship program shall be posted in conspicuous places throughout the plant. Each applicant for employment shall be given complete information about the availability of apprenticeships and the requirements for admission to them.

Those provisions of Appendix 10 of the August 1, 1968 Master Agreement between Bethlehem and the Union, pertaining to the manner of selection of apprentices for the Plant Apprenticeship Program shall be suspended for a period of five years from the date of this decree for all apprenticeship selection except those from Bricklayer Department 404. In lieu of those selection procedures defined in Appendix 10 to the August 1, 1968 Master Agreement, selection of apprentices for all crafts other than Bricklayer Department 404 shall be made by Bethlehem, under the general provisions of this decree.

7. Each applicant for the apprenticeship program within the period January 1, 1964 to October 1, 1967, who has not as of the date of this decree been hired as an apprentice but who met the standards actually applied to the least qualified white applicant who was accepted during that period shall be offered the opportunity to enter the apprenticeship program without further testing or other screening. Bethlehem Steel shall examine its records to determine the identity of all such applicants

and shall take appropriate steps and make reasonable efforts to notify such post-applicants and offer them apprentice opportunities in the order of the original application date -- earliest date first.

8. The Electronic Repair Training Program shall not be restricted either to employees of Department 444 or to employees of the Electrical Division. Within thirty (30) days of the date of this decree, Bethlehem Steel shall institute objective standards for the admission of electronic repair trainees and shall notify in writing all non-craft employees of the standards.

9. Within ten (10) days of the date of this decree, Bethlehem Steel shall post notices in all areas of the plant where employees of the Department 404 Labor Unit work and notify in writing all employees of the Department 404 Labor Unit of the requirements for admission into the Bricklayer apprenticeship program and of the availability of the Brickmason Craft Determination Test for entry into the craft. The notice shall request all 404 laborers who have not taken the Craft Determination Test and who desire to take such test to submit their names within thirty (30) days on a form to be provided by the defendant, which shall take immediate steps to schedule within thirty (30) days thereafter craft tests on company time for each person whose name appears on the list. All persons who equal or exceed the minimum

proficiency level deemed satisfactory in the past shall be placed on the "passed test" list. Those who pass the test shall on the basis of plant seniority be assigned to the craft unit as openings occur. No new hires into the craft shall be effected until all persons on the "passed test" list have been assigned to the craft unit or, having been offered assignment, declined the position. No openings in the craft shall be filled from the Bricklayer Apprenticeship program other than apprentices in the program at the date of entry of this decree and those hired as bricklayer apprentices pursuant to paragraph 7 above, prior to the assignment or offer of assignment of all persons on the "passed test" list.

10. Bethlehem Steel shall make available on-the-job and formal training to those Negroes electing to transfer, or enter the apprenticeship programs, pursuant to the provisions of this decree.

11. No Bethlehem Steel employee who has furnished information or participated in any respect in the investigation of the company's employment practices shall be discriminated or retaliated against in any manner because of the furnishing of such information or of such participation.

12. Bethlehem Steel and the defendant unions shall meet promptly to renegotiate the pool agreements

so as to reduce the number of pools to the minimum consistent with the orderly operation of the plant. Within sixty (60) days of the date of this decree, they shall submit to the court a plan for reduction of the number of pools (or, if they are in disagreement, a detailed statement of their respective views) and simultaneously therewith serve a copy upon the plaintiff. The plaintiff will have thirty (30) days thereafter to submit its views to the court, following which, in the event of disagreement, the court will rule upon the matter.

13. Bethlehem Steel shall file with the court and serve on the plaintiff within ninety (90) days of the date of this decree and every ninety (90) days thereafter for a period of three years a report showing for the period covered the following:

(a) All terminations or rejections by supervisory personnel of Negro employees during their probationary period.

(b) The recruitment efforts pursuant to paragraph 4, including a copy of printed matter distributed.

(c) The action with respect to previously rejected Negro applicants to the apprenticeship program taken pursuant to paragraph 7.

(d) The action relating to Department 404 pursuant to paragraph 9.

(c) The disposition of all employee bids, including the race of the bidder, pertaining to Department 512 pursuant to paragraph 5(a).

Ninety (90) days from the date of this decree Bethlehem Steel shall furnish to the plaintiff a list of all Negro employees of the defined class as of the date of this decree. This list shall be arranged by the employee's department on the date of this decree and seniority within that department. The list shall show which of these Negro employees elected to transfer to other departments, pursuant to paragraph 5(a); those persons whose transfer has been completed, together with their present rate of pay and department. Every thirty (30) days thereafter, until all Negroes of the defined class who have elected to transfer pursuant to paragraph 5(a) have been transferred, Bethlehem Steel shall furnish the same information about all Negro transfers.

Bethlehem Steel further shall furnish to the plaintiff within ninety (90) days of the date of this decree:

(a) The promotional list, provided for in paragraph 5(b), showing the new order for promotion in each department and the race of each employee on the list;

(b) A list of all persons who have been offered apprenticeships and placed in the apprenticeship program pursuant to paragraph 7; and

(c) A list of all applicants since the date of this decree, by race and date of application, indicating which applicants were hired and their initial assignment and which applicants were rejected and the reasons for rejection. A similar list of applicants shall be filed each ninety days for the first year from the date of this decree and semi-annually for the next two years.

Bethlehem Steel shall furnish to the plaintiff opy of all apprenticeship announcements made pursuant paragraph 6 and a copy of the standards established the Electronic Repair Training Program pursuant to agraph 8.

14. Bethlehem Steel shall make available to plaintiff at any and all reasonable times all records d as the bases for the reports and lists required by s decree and such other records as are maintained in nection with the hiring, rejection, assignment, trans-, promotion, and training of employees or applicants

for employments.

15. Copies of the decree shall be posted in places accessible to all employees for a period of ninety (90) days from the date of its entry, including at least one copy in each department and in each welfare unit of the plant. A copy shall be retained in the Employment Office and shall be made available on request to any employee for his inspection.

16. The court retains jurisdiction of this action for such additional and supplemental relief as may be required.

John O. Henderson

JOHN O. HENDERSON
United States District Judge

DATED: April 13, 1970.

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Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the fourth day of December, one thousand nine hundred and seventy-two.

Present:

HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,

Circuit Judges

72-1420

—o—

GEORGE H. WILLIAMSON, JR., et al.,

v.

BETHLEHEM STEEL CORPORATION, a corporation; LOCAL 2601, UNITED STEELWORKERS OF AMERICA; et al.

—o—

A petition for a rehearing having been filed herein by counsel for the appellee, Bethlehem Steel Corporation, upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

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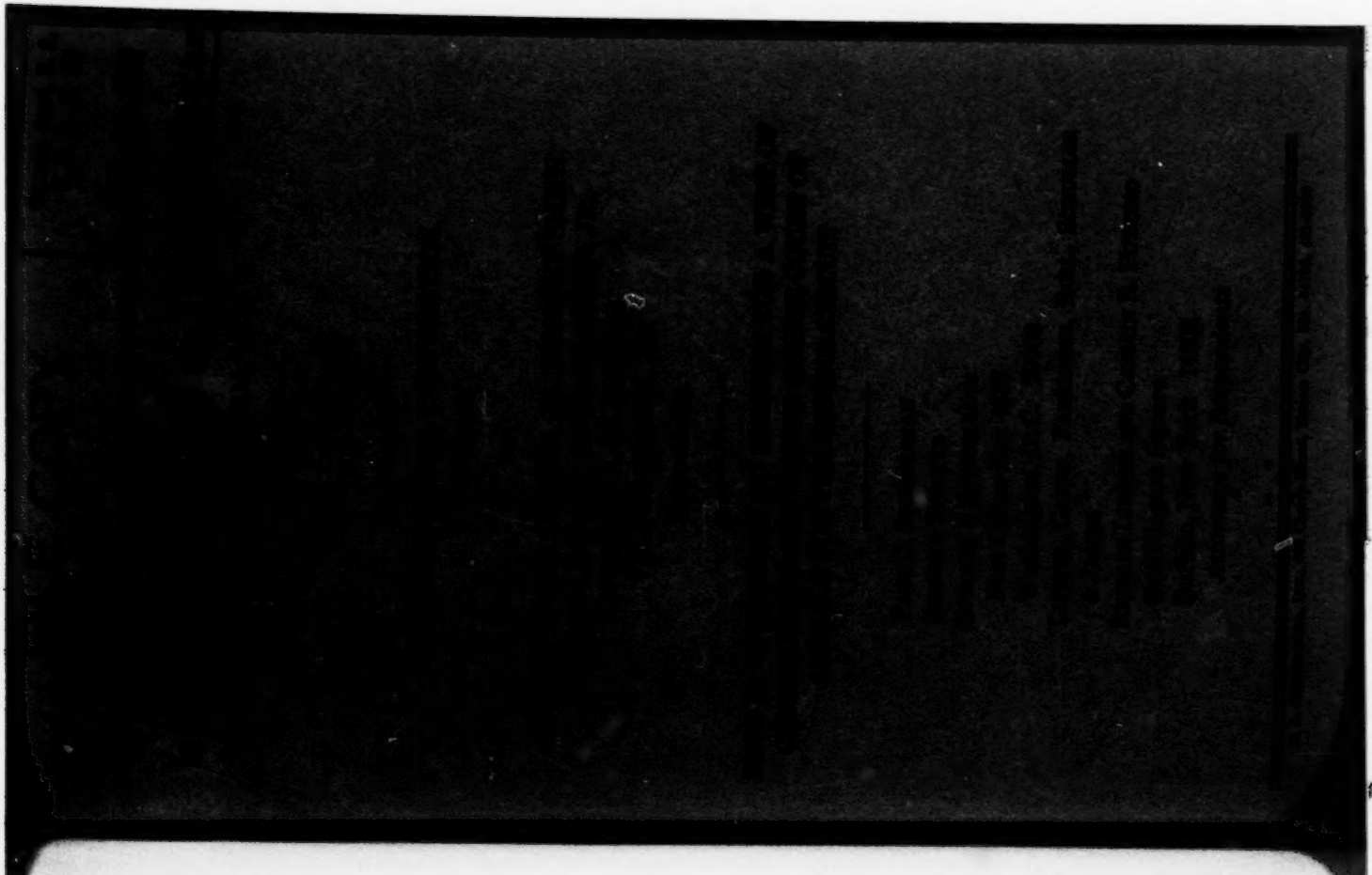

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 1004

BETHLEHEM STEEL CORPORATION,
Petitioner,

vs.

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK, and VELVET BROWN, JR.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Bethlehem Steel Corporation has filed a petition for a writ of certiorari with this Court seeking to overturn a decision of the Court of Appeals for the Second Circuit in which the appellate court held that private citizens filing suit under Section 706 of Title VII of the Civil Rights Act of 1964 are entitled to seek and obtain fair and adequate relief from racially discriminatory employment practices. Inasmuch as the existence of the

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unlawful practices and their discriminatory consequences are not disputed, the sole reason offered by Bethelehem for denying these employees the ordinary protection of the law is that prior to the instant litigation the Attorney General acting under the provisions of Section 707 of Title VII sought and obtained limited relief with respect to certain discriminatory employment practices other than those which are currently depriving Respondents and the class they represent of equal employment opportunity. Respondents respectfully urge the Court to deny the petition for the following reasons:

(1) Because the decision of the Court below—that private parties are not deprived of their right to be free from racial discrimination in employment because the Attorney General in prior litigation against their employer (to which they were not a party) did not seek relief against the practices which are currently victimizing them—is clearly correct as a matter of law and policy;

(2) Because the issues raised by petitioner are so insubstantial and so peculiar to the instant case as not to merit Supreme Court review; and

(3) Because review of this case in an interlocutory stage is not warranted.

Indeed, when the correctness of the decision below, the insubstantiality of petitioner's arguments, and the inappropriateness of this case for Supreme Court review are considered, we believe that the true purpose of this petition becomes clear: petitioner, which obtained a stay of the mandate of the court below pending decision of this petition, seeks to delay, as long as possible, the day when it will be forced to cease its discriminatory policies and obey the laws against racial discrimination in employment.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 468 F.2d 1201 (2d Cir. 1972) and the opinion of the District Court is reported in 5 FEP Cases 202 (W.D. N.Y. 1972). These opinions, as well as the opinions of the district court and the Court of Appeals in *United States* v. *Bethlehem Steel Corporation,* are accurately reproduced in the appendix to the petition.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Where pursuant to Section 707 of Title VII of the Civil Rights Act of 1964 the Attorney General of the United States brings a suit with limited objectives, seeking and obtaining limited relief, but leaving other serious unlawful employment practices intact, does the discriminator, Bethlehem Steel Corporation, thereby obtain an unassailable license to continue to engage in those unlawful practices with respect to which the Attorney General neither sought nor obtained relief.

COUNTERSTATEMENT OF THE CASE

The petition for certiorari seeks review of an order of the Court of Appeals remanding this case to the district court for a hearing in order to fashion "full, fair, just and adequate relief" (slip opinion at 327) from the discriminatory system of recall from layoff. Nowhere in its petition does Bethlehem deny that its system of recall from layoff operates to discriminate against blacks; rather it seeks to assert that because of prior litigation by the Department of Justice—to which respondents and the class they represent were not a party—the Company has obtained an irrevocable license to continue these discrim-

inatory practices. In order to fully appreciate the nature of Bethlehem's position in this case, a brief review of the prior litigation in both *United States* v. *Bethlehem* and the instant case is necessary.

1. United States v. Bethlehem Steel Corporation

In December of 1967, the Attorney General brought suit pursuant to Section 707 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-6) alleging that Bethlehem Steel discriminated against blacks by assigning them to the hottest, dirtiest, and lowest paying jobs in the plant and challenging the transfer provisions of its collective bargaining agreement on the grounds that these provisions locked black employees into the discriminatory assignments. As petitioner concedes on page 8 of its petition, no allegation was made in the Government complaint that the system of recall was discriminatory.

Shortly after the litigation was commenced, Bethlehem Steel entered into a stipulation with the Government admitting that Bethlehem had assigned blacks to the worst jobs (in part because Bethlehem officials believed that blacks could stand the heat better); that Bethlehem officials had deliberately raised the test scores of white job applicants to give them priority over blacks; and that generally the Company had followed a practice of excluding blacks from all but eleven of the plant's eighty-two departments.

Prior to the suit, the Company agreed to stop assigning job applicants on the basis of race, to stop falsifying test scores, and *in the future* to cease the other discriminatory assignment practices which it had used to effectively segregate its plant. It refused, however, to provide relief to the victims of its past practices and indeed disputed the Government's contention that the transfer system which in operation required employees to forfeit their

competitive seniority and rate of pay if they transferred was unlawful. The impact of Bethlehem's position was to place a penalty on incumbent black workers who had been assigned to the eleven least desirable, lowest paying departments, should these workers desire to transfer. Thus, these workers were frozen into the discriminatory assignment patterns of the past. The Government, accordingly, sought in the district court a remedy which would permit black employees originally assigned because of their race to transfer to the departments which had been closed to them in the past, and allowed the employee to retain his plant seniority (years of plant service) and rate of pay when he transferred. Although the district court found that the transfer system did have the effect of locking blacks into the departments to which they were discriminatorily assigned, it declined to grant the relief because of a variety of "collateral effects" of the Government's requested relief.[1]

The Government appealed from the failure of the district court to grant the seniority carryover and rate retention remedies it had requested. On appeal, the Court of Appeals for the Second Circuit reversed the District Court's failure to grant this relief holding that the transfer provisions of the collective bargaining agreement had the present effect of discriminating against blacks by locking them into discriminatory assignments and that "the business necessity doctrine does not require denial of the proposed relief." *United States* v. *Bethlehem Steel Corporation*, 446 F.2d 652, 664 (2d Cir. 1971). Accordingly,

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1. These "collateral effects" included the fact (1) that the remedy was afforded only to blacks who had been discriminatorily assigned to a department and not to other ethnic minorities; (2) that rate retention would result in differing rates of pay for doing the same job; and (3) seniority carryover would disrupt existing seniority expectations of white workers. *United States* v. *Bethlehem Steel Corp.*, 312 F.Supp. 977, 994-95 (W.D. N.Y. 1970). The effect of the remedy on the system of recall from layoff was nowhere mentioned.

the Court of Appeals ordered that the relief requested by the Government be implemented. In accordance with "the carefully limited order *suggested by the Government,*" these transfer rights were restricted to "*vacancies occurring in the normal course of business, i.e., vacancies caused by the death, retirement or transfer of an incumbent or by creation of a new job.*" id. at 663, 664 (emphasis added). And, "*as the Government suggests,* as workers are recalled following a layoff, all employees should assume the same positions relative to each other as they held immediately prior to layoff." id. at 664 (emphasis added).

Thus, the Court of Appeals ordered precisely the remedy requested by the Government.

2. The Instant Case

At about the same time that the Attorney General filed complaint Bethlehem entered a period of declining demand for employees. Substantial layoffs of long duration occurred affecting 50% of Bethlehem's workforce.[2] In mid-1971, however, a rising demand resulted in employees being recalled from layoff. Accordingly, the black workers of Bethlehem, frustrated by the failure of years of Government litigation to bring about any meaningful changes in their situation, brought the instant suit. They also sought preliminary relief respecting the recall from layoff system being used by Bethlehem and the unions.

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2. The impact of this economic fact on the Attorney General's decision to limit transfer rights to permanent vacancies was to deny the black workers of a meaningful remedy. The likelihood of a vacancy arising due to death, retirement or transfer when such a large portion of the workforce was on layoff was extremely low, since *all* laid off workers would have to be recalled before such a vacancy would exist. Thus, years of litigation netted the black worker virtually nothing in terms of improved opportunity. Moreover, Bethlehem's force reduction may itself be "permanent" thereby effectively foreclosing any meaningful right of transfer in the future, locking about 1400 black employees into the dirty, hot, low paying jobs they were originally assigned because black skin can "stand the heat better."

For the Company and the unions were unswerving in their determination to keep blacks in black jobs and whites in white jobs and were, therefore, returning workers from layoff based on their *departmental assignment at the time of layoff*. In short, in 1971 the Company and the unions were engaged in re-segregating the plant. The relief sought by plaintiffs was simple and fair requesting only that persons on layoff be returned from layoff to entry level and labor pool jobs which they were qualified to perform on a non-discriminatory basis.

The jurisdiction of the court was invoked pursuant to Section 706 of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866 (42 U.S.C. §1981). The legal basis for relief asserted by plaintiffs—that it is unlawful to perpetuate in the present the effects of past discrimination—is one that is now universally accepted. *Griggs* v. *Duke Power Co.*, 404 U.S. 424 (1971); *U. S.* v. *Jacksonville Terminal*, 451 F.2d 418 (5th Cir. 1971); *U. S.* v. *Bethlehem Steel Corp.*, 446 F.2d 452 (2d Cir. 1971); *Local 189, UPP* v. *United States*, 416 F.2d 980 (5th Cir. 1969). That a system of recall from layoff which preserves discriminatory assignments is unlawful was specifically held by the court below and by the Fifth Circuit. *Williamson* v. *Bethlehem Steel Corp.*, slip opinion at 326; *United States* v. *Hayes International Corp.*, 456 F.2d 112, 118-19 (5th Cir. 1972). In its petition for certiorari, Bethlehem does not challenge the soundness of legal basis on which plaintiffs rest their claim. Nor does Bethlehem dispute in its petition that its system of recall from layoff does, in fact, return black workers to the same hot, dirty and low paying jobs to which the company discriminatorily assigned them. Indeed, Bethlehem cannot dispute this fact, for the recall system is designed to do just that.

Since the requisite factual bases for a finding of past discrimination coupled with present discriminatory effect

are not disputed, and the legal principle requiring relief from such discrimination is well established, it is clear that Bethlehem has nothing to bring to this Court. But determined to continue its unlawful practices until compelled by court order to abandon them, Bethlehem with great solemnity (and even greater hypocrisy); praising the virtues of repose and mouthing the slogans of *res judicata, stare decisis* and collateral estoppel; noting the company's deep (albeit purely philosophical) concern with the effective enforcement of Title VII; urges this Court to give serious consideration to the proposition that the Attorney General of the United States has vested in the Bethlehem Steel Corporation an irrevocable license indefinitely to discriminate against its black employees. It is to this preposterous suggestion that Respondents are compelled to address themselves. We do so noting that the Court of Appeals for the Second Circuit was clearly correct when it rejected as absurd the "policy" arguments made by Petitioner and gave short shrift to the legal slogans offered in support of a judicial ruling in favor of a policy encouraging racial discrimination. That Court held that since Plaintiffs in the district court were neither parties to the Justice Department suit nor in privity with the Justice Department, they could not be bound as a matter of *res judicata* or collateral estoppel by the decision in *United States* v. *Bethlehem;* the Second Circuit also held that since "the Government did not seek relief in the case of recall after layoff . . . the earlier decision [does not] bind us on the basis of *stare decisis.*" It remanded the case to the district court to fashion "full, fair, just and adequate relief."

Bethlehem sought and was denied rehearing and rehearing *en banc* by the Second Circuit. It did, however, obtain a stay of the mandate of the Second Circuit pending decision of this petition. Thus, a hearing on the ap-

propriate relief to be granted and implementation of such relief awaits the disposition of this petition.

SUMMARY OF ARGUMENT

Bethlehem asserts three grounds which it claims are adequate to justify Supreme Court review. First, it claims that general policy considerations in favor of finality dictate that it obtained irrevocable sanction for its discriminatory practices. Second, it claims that *res judicata* and/or collateral estoppel preclude its discriminatory practices from being challenged by Respondents. Third, it argues that (apparently on the basis of *stare decisis*) that no relief against its discriminatory practices other than that requested and obtained by the Attorney General may be had. We show below that these arguments are wholly without merit. The *res judicata* and collateral estoppel arguments fail because private parties are not in privity with the Attorney General; petitioner's position has been rejected not only by the Court below and a district court in California, but also by the Attorney General and the EEOC. The *stare decisis* argument fails because, as the Court below held, the relief sought in the instant case was not an issue in *U. S.* v. *Bethlehem*. Other than the *res judicata* and *stare decisis* arguments there is no legal theory supporting finality Bethlehem's "policy" argument in favor of giving it a license to discriminate; to do so would be at odds with the national policy against racial discrimination. Moreover, this case involves interpretation of a statute which was amended subsequent to the bringing of this case and therefore the case is not of sufficiently general applicability to merit Supreme Court review. Finally, there is simply no reason for the Supreme Court to reach out for the issues raised at this interlocutory stage.

ARGUMENT

I.

There Is No Basis for Asserting Res Judicata or Collateral Estoppel.

The Court of Appeals in the instant case made short shrift of Petitioner's contention that *res judicata* or collateral estoppel were applicable to the present case:

> "For purposes of res judicata or collateral estoppel, the private citizens in this case are not bound by the Attorney General's action in the former case since they neither were parties to it, *NLRB* v. *Lannon Manufacturing Co.*, 226 F.2d 194, 199 (6th Cir. 1955), *rev'd on other grounds sub nom. Amalgamated Meat Cutters* v. *NLRB*, 352 U.S. 153 (1956), nor have interests such as to be in privity with the Attorney General. Cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-39 (1972) (intervention by union members permitted in Labor-Management Reporting and Disclosure Act litigation brought by the Secretary of Labor). Therefore, the judgment in the previous case does not have conclusive force here. See Restatement of Judgments §93 et seq. (1942); 1B J. Moore, Federal Practice ¶0.411[1] (2d ed. 1965). See also *Hartford Accident & Indemnity Co.* v. *Jasper*, 144 F.2d 266, 267 (9th Cir. 1944). (Slip opinion at 323)."

This Court should also summarily reject Bethlehem's contention. Under Title VII as originally enacted,[3] the

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3. Title VII was amended by the Equal Opportunity Act of 1972. The suit by the Attorney General and the instant action were brought under the old statute prior to its amendments. No argument is asserted that these new amendments govern the instant case. Petitioner's reference to them is apparently only as evidence of legislative intent under the old law.

United States was charged with eliminating gross violations of Title VII ("pattern[s] or practice[s] of resistance to the full enjoyment of any of the rights secured by this title. . . ." 42 U.S.C. §2000e-6). The aggrieved person was provided with an individual right of action to secure redress for personal injury. 42 U.S.C. §2000e-5(e). The prerequisites for this action included the submission of a charge of discrimination to EEOC and the issuance of a right to sue letter. Nothing in the Act suggested that the individual's private right under Section 706 was in any way contingent on action taken or not taken by the Attorney General. Thus, Congress did not create a representative relationship between the Attorney General and private parties.[4] Rather, Congress recognized the individual law suit was the primary means of enforcing individual rights.[5]

The conclusion that the Attorney General, under Section 707, does not represent private parties has been specifically approved by the Attorney General, the EEOC, and United States District Court for the Northern District of California, as well as the Second Circuit in the instant case. In *United States* v. *Operating Engineers Local 3*, ... F.Supp. ....., 4 FEP Cases 1088 (N.D. Cal. 1972), the Court ruled that where parallel actions by the Attorney General and private parties were proceeding, that the entry into a consent decree by the United States did not bar additional relief for the same violation being granted to the private party and stated that:

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4. Compare the Fair Labor Standard Act, 29 U.S.C. §216(c) which provides that the Secretary of Labor sues to collect wages "on behalf of an employee".

5. Congress recognized that both public and private interests might exist in the same situation, and provided that in such cases, where the Attorney General "certifies that the case is general public importance", he might intervene to represent the public interest. 42 U.S.C. §2000e-5(e). The provisions for intervention do not oust the private litigant nor do they diminish his role as the primary source of judicial enforcement of the Act.

> "Congress provided for both private and public actions under Title VII; and given that the possibility of the two proceedings at the same time would have occurred to the drafters of Title VII, it is only reasonable to expect Congress to have prohibited such simultaneous proceedings if it wanted to." 4 FEP Cases at 1093.

In *Operating Engineers*, the United States filed a brief in which it took the position that it was not the representative of the private parties (see 4 FEP Cases at 1093); in the instant case the EEOC filed an amicus brief in the Court of Appeals in which it specifically rejected the notion that the Attorney General represented private parties under Title VII. These interpretations by both the Attorney General and the EEOC—the agencies charged with administration of these sections—are entitled to great weight. *Griggs* v. *Duke Powers, supra; Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792 (1965). Moreover, there have been other cases where the private litigant and the Attorney General maintained simultaneous actions against the same defendant. See, e.g. *Vogler* v. *McCarty*, 294 F.Supp. 368 (E.D. La. 1967); *Dobbins* v. *Local 212, IBEW*, 292 F.Supp. 413 (S.D. Ohio 1968). There has never been a suggestion heretofore either that any action by the Attorney General controlled the rights of private parties seeking relief under Section 706, or that an action by the Attorney General precluded an action by the private litigant.

The litigation involving the practices of Crown Zellerbach and the United Papermakers Union is another instructive example of judicial sanction of multiple actions by private parties and the Attorney General. In this litigation, Crown Zellerbach and the United Papermakers Union were involved in litigation maintained by private litigants and the Attorney General, all involving the same basic issues of the defendants' discriminatory hiring, testing and senior-

ity practices,[6] and appropriate remedial orders were issued against the defendants in the private suit and in the suit brought by the Attorney General.

Against these authoritative interpretations of the statute on the precise point raised by petitioner, Bethlehem offers no comment. Rather, petitioner seeks help outside of the judicial interpretation of Title VII relying on two cases whose factual situations are so distinguishable from the instant case as to make them not even proximately relevant to the instant proceeding. In *Kersh Lake Drainage District* v. *Johnson,* 390 U.S. 485 (1940), one of the two authorities relied upon, the court ruled that certificate holders of a drainage district were bound by the result obtained by the Commissioners of a drainage district in litigation to collect drainage taxes. These Commissioners were specifically charged by the statute on which the certificates involved were drawn with "protecting and enforcing creditors rights on obligations issued by the District". 309 U.S. 490. It also held that the "Commissioners were comparable to corporate directors". id. at 490. It concluded that:

> "The very statutory plan from which the certificate obligations sprang contemplated that the Commissioners should represent the collective and corporate interests of the District in litigation between the District and the land owner involving matter personal to the land owner."

and that:

> "Certificate holders were not entitled to be made parties to these proceedings." id. at 491.

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6. *Hicks* v. *Crown Zellerbach Corp.*, 293 F.Supp. 104 (E.D. La. 1968); *Hicks* v. *Crown Zellerbach Corp.*, ... F.Supp. ....., 1 FEP Cases 577 (E.D. La. 1968); *U. S.* v. *Papermakers, Local 189,* 301 F.Supp. 906 (E.D. La. 1969).

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The Court likened the certificate holders to bond holders. Surely private citizens under Title VII, who have the right to bring actions in their own name and to intervene in actions brought by the Attorney General, do not bear a relationship to the Attorney General that is in any way like that of stock holder to corporate director or bond holder to indentured trustee.

The second case on which Bethlehem relies, *Heckman* v. *United States*, 224 U.S. 413 (1912), is, if anything, even further from the point. In *Heckman*, suit was brought by the United States as representative of the Cherokee nation, considered wards of the United States in a state of tutelage. The case stated that members of the tribe, who had been deprived by act of Congress of the right to alienate their individual land holdings, were not necessary parties to a suit adjudicating their rights to the land because the United States represented them for these purposes. Bethlehem refuses to realize that the Thirteenth and Fourteenth Amendments to the United States Constitution preclude this Court from treating black citizens in the same manner as wards and conquered tribes in a state of "tutelage." That Bethlehem would offer this Court such an argument demonstrates the legal and moral bankruptcy of its position. Accordingly, we respectfully submit, that Bethlehem's assertion of privity between the Attorney General is utterly without foundation and, therefore, its argument that *res judicata* or collateral estoppel should apply is baseless.

Res judicata is also inapplicable for another reason. The Attorney General's suit under Section 707 is no way the identical cause of action as the instant suit brought under Section 706 and 42 U.S.C. §1981. The Attorney General's authority requires no charge by a private party and may be brought upon certification by the Attorney General that he has probable cause to believe that a pattern or

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practice of discrimination exists. The instant case involves two separate causes of action, neither of which is the same as the pattern or practice suit under Section 707. To come into being a cause of action pursuant to Section 706 requires *inter alia:* (1) a violation of Section 703 or 704 of Title VII; (2) formal charges first, to the state fair employment authorities and then to EEOC; (3) the issuance of a suit letter by the EEOC; and (4) the bringing of suit pursuant to that letter within thirty days of its issuance. See *Miller* v. *International Paper,* 408 F.2d 283 (5th Cir. 1969). Thus, the cause of action under Section 706 is quite different from one brought under Section 707. Similarly, a cause of action under 42 U.S.C. §1981—which assures blacks the same right to make contracts as is enjoyed by white citizens—is totally distinct from a Section 707 action. In addition, as we have shown, the issue of recall from layoff was never litigated; therefore, collateral estoppel cannot apply.

II.

Stare Decisis Does Not Apply.

Bethlehem also argues that because Respondents relied on the record in *United States* v. *Bethlehem* to establish past discrimination, they are as a matter of law limited to the relief sought and obtained by the Attorney General. We take this argument to assert only that Bethlehem contends that the decision in *U. S.* v. *Bethlehem* is a binding precedent against granting relief in any way different from that sought by Attorney General i.e., that Bethlehem relies on the doctrine of *stare decisis;* to give its argument any greater breadth would be to give the prior action *res judicata* effect—and that argument has been dealt with above.

For *stare decisis* to apply, the precise issue must have been actually decided by a court as the result of an adversarial dispute. *O'Donoghue* v. *United States,* 289 U.S. 516, 550 (1933). It is clear from a review of the district

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court opinion that the issue of recall was never before the court and that that court never decided anything with respect to that issue. (See footnote 1 *supra*). And, the Court of Appeals in *U. S.* v. *Bethlehem* "touched upon" the issue of recall from layoff "only to clarify that it was an issue which was not decided in that case". *Williamson* v. *Bethlehem*, slip opinion at 321. Since neither court ever passed upon the legality of Bethlehem's system of recall, the doctrine of *stare decisis* cannot apply. Indeed, at pages 19-20 of its petition, Bethlehem concedes as much, for it admits that in its reply brief the United States removed any consideration of the issue from the court.[7]

III.

The National Policy Against Racial Discrimination Precludes Giving Bethlehem a License to Discriminate.

The first reason that Bethlehem asserts a writ should be granted is because the failure to allow the Attorney General to preclude subsequent actions by private parties will have an adverse impact on the enforcement of Title VII. We have saved consideration of this point until after the discussion of the *res judicata* and *stare decisis* points because discussion of these points, we believe, makes it clear that this "policy" argument on the part of Bethlehem has no legal basis apart from *res judicata*, collateral es-

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7. Bethlehem misrepresents to this Court that the Government requested any modification of the recall from layoff system. In the Court below, respondents set forth an exhaustive review of the papers in *U. S.* v. *Bethlehem* including the original relief sought by the United States in its proposed decree before the district court, the notice of appeal, the briefs of the parties and a letter from the Assistant Attorney General for the Civil Rights Division stating that respondents were seeking "relief which the government did not request". The Second Circuit interpreting the opinion of a panel of its own judges concluded that "the Government expressly did not seek the relief." *Williamson*, slip opinion at 322. We submit that there is no reason for the Supreme Court to review this finding of fact.

toppel and *stare decisis*. As we showed above, in our discussion of the relevant statutory language, there is simply no support for Bethlehem's assertion that anything in Title VII would give the conclusive effect it suggests to an action brought by an Attorney General under Title VII. Accordingly, we submit that its policy arguments are better addressed to the legislature which enacted the statutory scheme than to the Supreme Court.

However, in view of the possibility that this Court has these arguments before it, we wish to note our total disagreement with them. Manifestly, the national policy against racial discrimination—which this Court has stated to be a policy "of the highest priority", *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964 (1968)—far outweighs any of the interest in finality asserted by petitioner, particularly when what Petitioner seeks is final judicial approval of a policy of racial discrimination.

Congress, the Courts and the Executive intended that a broad range of parallel and overlapping remedies for racial discrimination in employment be available. See, *Young* v. *ITT*, 438 F.2d 757 (3d Cir. 1971). The statutory remedies for employment discrimination include the Civil Rights Act of 1886 (42 U.S.C. §1981—one of the provisions under which this action is brought); the Civil Rights Act of 1871 (42 U.S.C. §1983—which applies to employment discrimination involving state action); a private action under Section 706 of Title VII; an enforcement action by the Equal Employment Opportunity Commission under Section 706 of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972; and a pattern and practice suit under Title VII. The President has issued a series of executive orders dating back to 1941 forbidding racial discrimination by gov-

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ernment contractors. The latest major revision of these executive orders, E.O. 11246, created an Office of Federal Contract Compliance which administers a broad-ranging system to regulate the employment practices of employers with whom the government contracts. Moreover, certain regulatory agencies have recognized their responsibility not to sanction or support racial discrimination in the industries they regulate and began proceedings against these industries. See e.g., In the Matter of In Re Petitions filed by EEOC, FCC, Docket No. 19143 (Proceedings against AT&T).

In addition, many states have remedies for racial discrimination which under Section 706 must be resorted to prior to invoking federal jurisdiction. In no case is resort to the state remedy a bar to a separate federal action. See *EEOC* v. *Cement Masons, Local 770*, ... F. Supp. ....., 1 FEP Cases 189 (S.D. N.Y. 1967); *Spell* v. *Theatrical Local 77*, ... F.Supp. ....., 1 FEP Cases 851 (D. N.J. 1969).[8]

Bethlehem's other attempts at manufacturing a legislative intent which supports its novel theories are not surprisingly unsupported by any citation to the legislative history of the 1972 amendments. We see no point in reciting all the legislative history omitted by petitioner. We would

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8. Petitioners' contention that the 1972 amendment to Section 706(b) which provides that in *investigating* a charge, *the EEOC* "shall accord substantial weight to final findings and orders" of state and local authorities evidences a congressional policy against multiple suits is clearly wrong. First of all, this provision only requires that substantial weight, not binding effect, be given to orders of state authorities. Thus, Congress refused to allow these authorities the power which they contend this Court should manufacture for the Attorney General. Second, the provision quoted provides only to EEOC. Thus, even if EEOC gave binding effect to a state authority and therefore dismissed a charge, the employee, under Section 706(f) (1), would have the right to bring an action in federal court.

point out, however, that as the court below indicated, Congress in passing the 1972 amendments was careful to preserve the private right of action. It did this in a number of ways. First, although it gave the EEOC new power to enforce the act by federal court suit based directly on a private charge, it provided for intervention rights in that suit. Second, it provided that if EEOC determined to settle a case prior to suit by means of conciliation, the charging party could still sue on his charge unless he agreed to the conciliation agreement.

> if . . . the Commission has not entered into a conciliation agreement *to which the person aggrieved is a party* . . . a civil action may be brought . . . by the person claiming to be aggrieved. Section 706(f)(1).

Third, during the passage of the 1972 Act, attempts to repeal provisions of the 1866 Civil Rights Act were defeated. See 118 Cong. Rec. S.1526 (Daily Edition February 9, 1972); 118 Cong. Rec. S.1797 (Daily Edition February 15, 1972). And the Senate Committee made it clear that neither the "provisions regarding the individual's right to sue under Title VII nor any of the provisions of this bill are meant to affect existing rights granted under other laws" S. Rep. No. 415 at 24. See generally, G. Sape and T. Hart; *Title VII Reconsidered—The Equal Employment Opportunity Act of 1972*, 40 G.W.U. Law Rev. 824, 884-888 (1972).

Finally, we note that Bethlehem's argument that failure to accord finality to agreements reached between the Attorney General and discriminators will discourage voluntary compliance by those discriminators is pure sophistry. Bethlehem's notion of "voluntary compliance" is well illustrated by its conduct in the present case. After stipulating to practices which the district court held created "a sorry image", 312 F.Supp. at 979, Bethlehem spent almost

four years litigating with the government over appropriate relief. By and large the "cooperation" of Bethlehem with the government consisted of entering into a stipulation of facts which the government would have had no difficulty proving, and agreeing to stop some of the more blatant practices of discriminatory assignment, like falsifying test scores. Moreover, even after a judicial determination that its seniority and transfer provisions at Lackawanna were unlawful, Bethlehem continued these very practices at its Sparrows Point, Maryland plant, even though the Second Circuit in *U. S.* v. *Bethlehem* noted that the Sparrows Point situation was identical to that at Lackawanna and, therefore, equally unlawful. See *U. S.* v. *Bethlehem*, 446 F.2d at 664-65. Moreover, on January 15, 1973, the Secretary of Labor issued an order which paralleled that rendered by the Second Circuit in *U. S.* v. *Bethlehem* over a year and a half before. This marked the first time the Secretary acting pursuant to E.O. 11246 had ever ordered such relief.

Rather than rely on Bethlehem's arguments concerning effective enforcement of Title VII, we submit that this court should look to the position of the EEOC and the Attorney General as well as the Court below. Unlike Bethlehem these institutions do not find their interpretation of the law hampered by a desire to continue unlawful employment practices. In the court below, the EEOC filed an *amicus* brief in which it argued against finality and stated that "the amended Acts made it clear, however, that the government is still not to have the last word in the attack on employment discrimination." Similarly, the United States in *U. S.* v. *Operating Engineers*, *supra*, filed a brief in which it supported the right of private parties to obtain relief beyond that which the United States had obtained pursuant to a consent decree. In that case, the Court rejected finality of such decrees.

IV.

The Issues Raised by Bethlehem Are Not Substantial Enough to Merit Supreme Court Review.

From this review of the points raised by Bethlehem in favor of granting its petition, we submit that it is clear that the issues are not of a character which would justify Supreme Court review. None of the arguments raised by Bethlehem indicate any conflict among the circuits on any of the issues raised. Moreover, its attempt to find a conflict on the *res judicata* questions between decisions of this court and the decision of the Second Circuit are clearly baseless. Nor are the issues raised of such general applicability or importance as to justify Supreme Court review. They apply only to suits brought by the Attorney General whose power to bring pattern and practice suits expires in 1974. Any consideration of the effect of EEOC enforcement on a private right of action should await a case where that factual issue has been raised. The arguments in favor of finality on the basis of *res judicata*, collateral estoppel and policy, are so insubstantial on their face as to not merit review. The *stare decisis* argument, which involves the interpretation by the Second Circuit of its own opinion and decree hardly merits review by this court, especially when it is considered that none of the judges who rendered the original decree in *U. S.* v. *Bethlehem* were willing to even request a vote on Bethlehem's request for rehearing *en banc*.

V.

The Supreme Court Review at This Interlocutory Stage Is Inappropriate.

In its petition Bethlehem asks this Court to reach out for the issues it presents, even though all that the Second Circuit has done is to remand the case to the district court

for a hearing on the appropriate relief. Until such relief is ordered by the district court, there is no guarantee that relief "inconsistent" with the relief granted in *United States* v. *Bethlehem* will, in fact, be granted. Bethlehem offers no adequate reason why this Court should adjudicate an issue which it may never be necessary for it to do.

CONCLUSION

For all of the foregoing reasons, Bethlehem's petition for writ of certiorari should be denied. Because Bethlehem has obtained a stay of the mandate of the Court below pending disposition of the petition, we respectfully urge that this disposition be expedited.

Respectfully submitted,

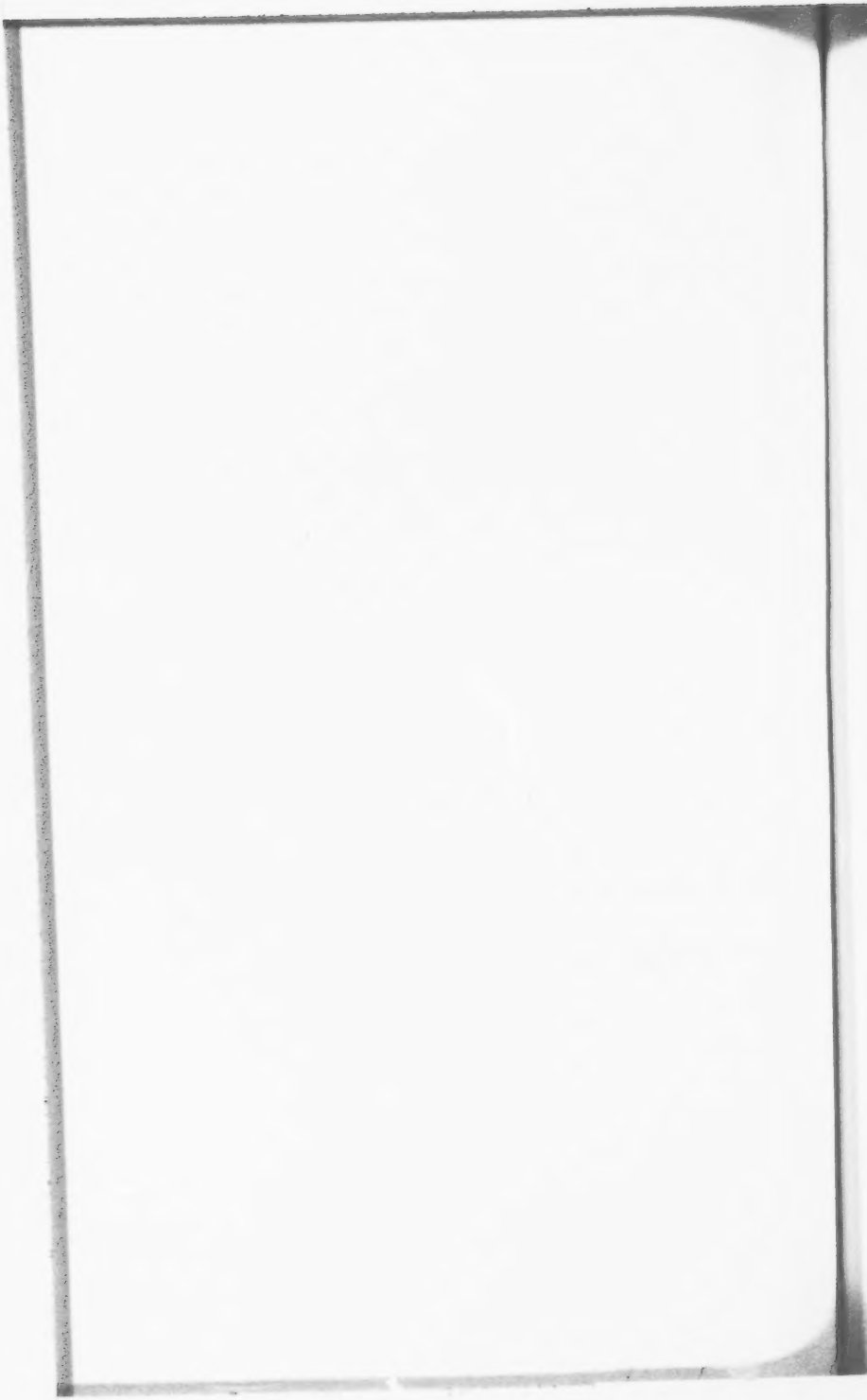
SPECTER & SPIEGELMAN

By: Russell Specter

RUSSELL SPECTER
PAUL J. SPIEGELMAN
Post Office Box 4887
Washington, D. C. 20008

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES

RICHARD LIPSITZ AND CARMIN R. PUTRINO
One Niagara Square
Buffalo, New York 14202
Attorneys for Respondents



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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1004

BETHLEHEM STEEL CORPORATION,

Petitioner,

v.

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK and VELVET BROWN, JR.,

Respondents.

REPLY BRIEF FOR PETITIONER BETHLEHEM STEEL CORPORATION

RALPH L. MCAFEE
One Chase Manhattan Plaza
New York, N.Y. 10005
Attorney for Petitioner

CRAVATH, SWAINE & MOORE
Robert S. Rifkind
Anthony A. Dean
Wayne A. Cross

Kenneth L. Houck
Edward C. Perkins
Of Counsel

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Statement

Respondents' brief in opposition to Bethlehem's petition for certiorari conveys the false impression that this litigation involves present, systematic and admitted discrimination against black employees at Bethlehem's Lackawanna Plant and that such discrimination continues because the United States sought and obtained only limited relief in *United States v. Bethlehem.**

These arguments constitute such a flagrant mischaracterization of the results achieved in the United States'

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*United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970), *modified*, 446 F.2d 652 (2d Cir. 1971). The opinion of the court of appeals is set out at Appendix C-1 to Bethlehem's Petition. All citations to that opinion will be to that appendix, *e.g.*, C-1 at 653.

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action as to compel submission of this reply brief in order to clarify the following points:

(1) *United States* v. *Bethlehem* was a broad and vigorously prosecuted pattern-or-practice suit in which the Government obtained comprehensive relief for black employees at the Lackawanna Plant, including respondents. In that case, the court of appeals decided the maximum extent, consistent with safe and efficient operation of the Plant, to which the seniority and transfer provisions of the collective bargaining agreements between the Union and Bethlehem could be modified to provide relief from the continuing effects of past discrimination.

(2) Respondents' assertions that Bethlehem is presently pursuing intentional discriminatory practices at the Lackawanna Plant and has admitted such present discrimination are wholly unfounded and obviously designed to divert attention from the important legal issues and policy questions concerning the interpretation and administration of Title VII presented by Bethlehem's petition.

Argument

1. *United States* v. *Bethlehem.*

The Attorney General commenced *United States* v. *Bethlehem* on December 6, 1967, seeking not "limited relief" as argued by respondents, but rather ". . . an order enjoining the defendant . . . from engaging in any racially discriminatory employment practice . . ." including:

(1) discriminatory application of qualifying criteria for hiring, referring, transferring and assigning black employees vis à vis whites;

(2) referring and assigning black employees to less desirable jobs and white employees with similar or lower qualifications to more desirable jobs;

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(3) discrimination in the application of standards for admission to plant apprenticeship programs;

(4) discrimination in providing opportunities for advancement;

(5) engaging in any other discriminatory conduct as to recruiting, hiring, referral, transfer or assignments; and

(6) failing or refusing to take reasonable steps to correct the effects of past discriminatory practices (App. at 6-7*).

The complaint was amended on May 15, 1968, to join the United Steelworkers of America and five of its locals (the Unions) as defendants, alleging that "[c]ertain provisions of the collective bargaining agreements entered into between Bethlehem and the defendant unions perpetuate the effects of the discriminatory acts and practices of Bethlehem..." (App. at 11). The amended complaint sought to "... enjoin Bethlehem and the defendant unions . . . from failing or refusing to take all reasonable steps to alter the collective bargaining agreements so as to correct the effects of past racial discrimination..." (App. at 12).

Promptly after commencement of the suit, Bethlehem and the Attorney General conducted an intensive investigation into the facts of the alleged discrimination at the Lackawanna Plant. The Government was given an on-site office and provided with use of the Company's computer, accounting, duplicating and clerical employees. Extensive employee interviews were conducted and documents produced without recourse to subpoenas, depositions or interrogatories.

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* References are to the record in *United States* v. *Bethlehem* upon which respondents place sole reliance in their request for preliminary relief. Copies of the portions of the Appendix in that action which are referred to herein have been filed with the Clerk of the Court.

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Exhaustive statistical studies were prepared on the racial distribution of employees at the Plant and various other subjects. Those joint investigations extended beyond the limits of even the broad amended complaint into areas such as Company-owned housing as well as schools and recreational facilities in the Lackawanna area.

After more than seven months of investigation, Bethlehem and the Government entered into a 78-page stipulation of fact in which Bethlehem conceded that black employees had in the past been discriminatorily assigned and had been denied equal advancement opportunities (App. at 21-98). At the same time, the Government conceded that these practices had ceased by October of 1967.

Two more months of investigation and negotiation produced a second stipulation of fact covering the provisions and operations of the existing collective bargaining agreements. Layoff, recall and transfer procedures which the Government proposed to modify were among the subjects covered by this stipulation (App. at 102-05).

Prior to trial, agreement was reached on the terms of the decree which was ultimately entered by the district court regarding all aspects of the broad relief originally sought by the Government except its proposed modifications of the seniority and transfer practices. The principal issue which remained for trial involved the extent to which the collective bargaining agreements should be modified, consistent with the safe and efficient operation of the Plant, in order to eliminate vestiges of past discrimination.

The case was tried over a period of nine days in November 1968 and January 1969 and a decision was rendered on April 13, 1970. The relief granted, embodying that previously agreed upon, included the following:

> (1) forbidding the assignment of black employees to eleven specified departments on a discriminatory basis;

(2) establishment of procedures to eliminate discriminatory standards for hiring, recall, assignment and transfer;

(3) independent validation of all employment screening tests and the electrical and mechanical tests to assure that they were job related and establishment of specific passing scores on tests which were administered;

(4) provisions for preferential transfer opportunities based on plant seniority for all employees previously assigned to the eleven predominantly black departments;

(5) granting of preferential rights to promotion to supervisory positions for qualified black employees and periodic review of the qualifications of those employees not already promoted;

(6) establishment of objective qualifications for supervisory positions;

(7) requirement of adequate notice of apprenticeship opportunities and the standards for admission to the program;

(8) provision for offering apprenticeships to black employees hired between January 1, 1964, and October 1, 1967, who met the standards applied to the least qualified white applicant accepted for the apprentice program during that period;

(9) institution of objective criteria for admission of electronic repair trainees and notification of all non-craft employees of those standards;

(10) special provisions for notice of and admission to the bricklayer apprentice program and brickmason craft positions;

(11) reduction of the number of labor pools to increase mobility under existing collective bargaining agreements;

(12) elimination of preferences in employment, assignment, transfer, recall or promotion based on relationship to employees;

(13) implementation of a recruiting program designed to assure minorities equal opportunity; and

(14) requirements that Bethlehem make periodic reports regarding various aspects of the decree in order that both the Government and the court might monitor Bethlehem's performance under the decree (C-4).

On appeal, the Government sought to add to this broad relief the right to rate retention for transferees and the use of plant seniority in their new jobs, both of which the district court had refused to allow. It argued initially that transferees be permitted the use of plant seniority for "all purposes" (U.S. Br. at 39). The Company opposed those proposals on the ground that such modifications of the collective bargaining agreement would have disastrous effects on the safety of all employees and on the continued economic viability of the Plant (Beth. Br. at 25-51). Thereafter, as discussed at pages 18-21 of the Petition, the Government acknowledged in its reply brief that use of plant service upon recall from layoff to displace incumbent employees was inappropriate because of the adverse impact that such "bumping" would have on the safety and efficiency of the Plant.

On June 21, 1971, the court of appeals granted substantially all the relief sought by the Government. Its considered decision as to the extent to which the transfer and seniority provisions of the collective bargaining agreements could be modified consistent with the safe and efficient operation of the Plant adopted the Government's

view that use of plant seniority to "bump" incumbent employees upon recall from layoff was not consistent with either safety or efficiency, but that limited seniority carryover and rate retention for transferees were appropriate modifications.

The court of appeals apparently still harbored serious reservations about the potential impact the modifications of the bargaining agreements would have on the operations of the Plant. On its own initiative, it limited transfer rights under the Amended Decree as follows: "A transferee's right to transfer with seniority carryover and rate retention may be exercised only once, and only during the next two years." (C-1 at 666). Thereafter, the parties alerted the court of appeals to the fact that, as a result of the then in progress industry-wide negotiations of a new collective bargaining agreement, a substantial reduction in employment would occur which would limit the speed with which transfer opportunities would be available to black employees (Joint Motion for Clarification, July 16, 1971). With the consent of the parties, the court eliminated the two-year limitation it had previously imposed (C-3 at ¶ 5(a)(3)). Despite that explicit recognition by the court of appeals of the problems presented by the 1971 reduction in employment, respondents nonetheless bottom their right to relief in the instant case on the fact that this same reduction in employment frustrated the relief granted in *United States* v. *Bethlehem.*

Respondents' attempt to portray themselves and the broad class they purport to represent under Rule 23 (*i.e.*, all "black persons who have been, are employed or might be employed by Bethlehem Steel Corporation") as employees whose interests were not served by the Government is rendered absurd by the facts concerning the Government's handling of the case, including the extensive investigations and negotiations, the breadth of the relief sought and obtained by the United States, as well as the exhaustive trial and comprehensive appellate review. The issue of whether and to what extent the seniority and transfer

provisions of the collective bargaining agreements could be modified to eliminate the effects of past discrimination and still preserve the safety and efficiency of the Plant was thoroughly explored by the Government and fully presented to and considered by the court of appeals. Respondents are not isolated employees whose rights were not adjudicated, but are members of the class of black employees on whose behalf the United States was successful in obtaining the very broad and comprehensive relief heretofore described.

2. *Present Discrimination.*

Respondents seem to assert that this action is an effort to eliminate presently existing discriminatory practices. They claim that Bethlehem is seeking "an irrevocable license to continue these discriminatory practices" (Br. in Opp. at 3-4) and that it is trying to "delay, as long as possible, the day when it will be forced to cease its discriminatory policies" (Br. in Opp. at 2). Moreover, they contend that the Company cannot dispute that the recall system is discriminatory because it was so "designed" (Br. in Opp. at 7).

These charges are completely answered by the record in *United States* v. *Bethlehem* (on which respondents rely exclusively) which conclusively establishes that Bethlehem ceased all discriminatory employment practices no later than October 1, 1967 (C-1 at 657, 658).

Respondents' attempt to cast this case in the mold of the classic southern mill discrimination cases is as misleading as respondents' assertions of present discrimination. This case is simply not analogous to cases such as *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) (where white and black departments were maintained and overtly discriminatory transfer procedures which had no possible business necessity justification were used to defeat mobility for black workers), and *United States* v. *Local 189*, 282 F. Supp. 39 (E.D. La. 1968), 301 F. Supp. 906 (E.D. La.),

aff'd, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (involving predominantly white and black lines of progression with a substantial pay differential and segregated white and black local unions with a white local having jurisdiction over access to the preferred white lines of progression).

Black employees at Lackawanna have never been placed in circumstances such as those discussed in the cases relied on by respondents. There has always been a percentage of black employees at the Plant which is greater than the black population in the Lackawanna area, and those employees have never been relegated solely to menial labor jobs, but have occupied jobs at all levels in the Plant, including those requiring skill and imposing substantial responsibilities. As the record in *United States* v. *Bethlehem* reveals, no substantial economic disparity existed despite the admitted discriminatory practices prior to October 1967. In 1970 * the average hourly earnings of black employees in the eleven predominantly black departments was 96.7% of that of employees in the other 63 departments of the Plant—$4.014 as compared with $4.149 (Ex. G-7). Among employees hired from 1955 to 1970, the black employees hired earned on the average only 2% less than the whites hired (Ex. G-7).

Moreover, the transfer and seniority system established by industry-wide negotiations, has always been racially neutral. In particular, the recall system at Lackawanna, unlike the practices described in *Quarles* and *Local 189*, is designed to promote the safe and efficient operation of the Plant by returning employees from layoff to the departments in which they have accumulated years of experience in difficult and dangerous jobs. Respondents' alternative to this system—which was rejected by both the Government and the court of appeals in *United States*

* 1970 is the last year for which statistics exist in the record of *United States* v. *Bethlehem*.

v. *Bethlehem*—would permit inexperienced employees from other departments to occupy those jobs, producing the "unsettling effects of seniority carry-over during periods of layoff and recall" which the court of appeals found necessary to avoid (C-1 at 664).

Respondents' ill-founded efforts to associate Bethlehem with hard-core forms of discrimination and their attempt to minimize the significance of the Government's prior suit are obviously intended to obscure the serious issues of law and policy questions presented by Bethlehem's petition. Respondents' inflammatory remarks should not divert attention from the principal point presented to this Court—that the future efficacy of Title VII depends upon according the usual legal attributes of finality to judgments rendered in comprehensive pattern-or-practice suits brought by the United States.

Conclusion

Accordingly, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

RALPH L. MCAFEE
One Chase Manhattan Plaza
New York, N.Y. 10005
212-422-3000
Attorney for Petitioner

CRAVATH, SWAINE & MOORE
Robert S. Rifkind
Anthony A. Dean
Wayne A. Cross

Kenneth L. Houck
Edward C. Perkins
Of Counsel

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